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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 **REPLY IN SUPPORT OF DEFENDANTS' DEMURRER** Date: 3:30 p.m. Time: December 14, 2017 Dept.: 501 Judge: Hon. Mark W. Snauffer Action Filed: Sept. 7, 2017

Defendants Xavier Becerra, Stephen Lindley, and the California Department of Justice (collectively, "DOJ"), submit this reply in support of their demurrer to the Complaint.

ARGUMENT

I. THE CLAIMS ARE NOT COGNIZABLE UNDER GOVERNMENT CODE SECTION 11350

Plaintiffs bring all nine of their causes of action under Government Code section 11350, which provides that specific standards under the Administrative Procedure Act ("APA") must be considered in determining the validity of a regulation. (Compl. ¶¶ 75-198; see also Compl. ¶ 10 ["Plaintiffs bring this action under Government Code section 11350(a) to challenge the validity of and to enjoin Defendants from enforcing these regulations."].) The Supreme Court has stated that section 11350 has no application to regulations that are exempt from the APA: "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. (*Pacific Legal*).)

Contrary to Plaintiffs' assertion (Pls.' Opp. to Demurrer ("Pls.' Opp.") at 18), DOJ contends that all claims for declaratory alleged under section 11350 fail, including those alleging that the regulations conflict with the assault weapons law. All of Plaintiffs' challenges allege that the regulations are outside of DOJ's rulemaking authority; the allegation that the regulations conflict with the authorizing statute is part of that claim, not a freestanding claim. All causes of action allege that "defendants violated the APA because they lack authority to adopt such regulation[s]," and seek judicial declarations as to "whether the regulations violate[] the APA" or are "necessary and appropriate" as required under the APA. (Compl. ¶¶ 79, 80, 89, 90, 102, 103, 119, 120, 134, 135, 152, 153, 162, 163, 177, 178, 194, 195.) These claims cannot be litigated under Government Code section 11350, which presumes the applicability of the APA to the regulations under consideration, and which the Supreme Court has expressly stated do not apply in this situation. (See *Pacific Legal*, *supra*, 33 Cal.3d at p. 169 fn.4.)

As DOJ has argued (DOJ's Memorandum of Points and Authorities in Support of Its Demurrer ("Demurrer") at 8-9), the only appropriate vehicle for Plaintiffs' challenge is a petition for writ of mandamus. Plaintiffs' claims cannot properly be construed as claims for declaratory

relief under Code of Civil Procedure section 1060. Although *Pacific Legal* itself involved an action for declaratory relief, the interpretive guidelines at issue there represented "the formulation of a general policy intended to govern future [Coastal Act] permit decisions," which "adopt a flexible approach" allowing access conditions to be imposed "on a case-by-case basis." (33 Cal.3d at pp. 168, 174). Because those claims required "speculat[ion] as to the type of developments for which [hypothetical] access conditions might be imposed," the Supreme Court found that the claim for declaratory relief was not yet ripe. (*Id*. at pp. 172, 174.)

Here, Plaintiffs are not challenging an overarching policy, but discrete regulations. The administrative decision at issue here is DOJ's adoption of regulations implementing a program with a fixed end date. It is not the "overarching, quasi-legislative policy set by an administrative agency" of the kind discussed in *Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1423-1425, 1429 [alleging that agency repeatedly failed to comply with requirements for responses to public comments on and cumulative impact assessments of proposed timber harvest plans].) Plaintiffs' challenge is precisely the type of administrative decision that must be reviewed in a traditional mandamus action, and subject to the limitations of that review, rather than in an action for declaratory relief. The Court should sustain the demurrer this ground alone. (See Demurrer at 9.)

II. ALL OF THE REGULATIONS ARE WITHIN DOJ'S RULEMAKING AUTHORITY AND ARE REASONABLY NECESSARY TO IMPLEMENT THE REGISTRATION PROCESS

DOJ's exemption from APA procedures for regulations implementing the bullet-button assault weapon registration process covers any and all regulations that are related to and reasonably necessary for administration of that process. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 (*Yamaha Corp.*).) "An administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate," and the "absence of any specific statutory provisions regarding the regulation of an issue does not mean that such a regulation exceeds statutory authority," because the agency is "authorized to 'fill up the details' of the statutory scheme." (*PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1298-99, 1307-08 [regulations requiring information not required by statute did not conflict with

authorizing statute], brackets omitted, quoting *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 362.) This interpretation of DOJ's rulemaking power is fully consistent with the public protection purpose of the assault weapons law, which is based on a legislative finding that "the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state." (Pen. Code, § 30505, subd. (a); see *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [where uncertainty exists, consideration should be given to the public policy consequences that would flow from particular interpretation].) Registration is a key component of the Legislature's attempt to regulate weapons "designed only to facilitate the maximum destruction of human life." (See, e.g., Request for Judicial Notice in Support of Demurrer, Ex. 1 at 3, Ex. 2 at 3, Ex. 5 at 6.) All of the regulations at issue here directly support DOJ's ability to run an effective registration process.

A. The Challenged Regulations Apply Only for Registration Purposes, as Demonstrated by the Pending APA Rulemaking Proceeding

Subsequent to the filing of the demurrer, DOJ released for public comment under the APA a proposed regulation that would adopt the definitions in section 5471[1] "for all purposes relating to the identification of assault weapons pursuant to Penal Code section 30515." (Proposed § 5460.) The 45-day public comment period ran from November 24, 2017 through January 8, 2018. (Gov. Code, § 11346.4.) DOJ also held a public comment meeting as provided for in the APA, on January 8, 2017. (*Id*. § 11346.8.) DOJ received over 2,200 comments on the proposed regulation during the public comment period, many of them concerning the specific definitions in section 5471 and their application to the identification of assault weapons for all purposes. DOJ must respond to the public comments by including in its final statement of reasons "[a] summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change." (*Id*.

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

§ 11346.9, subd. (a)(3).) The Office of Administrative Law will review the rulemaking file for compliance with the procedural and substantive requirements of the APA, and will approve or disapprove the proposed regulation, before the regulation can take effect. (*Id*. §§ 11349.1, 11349.3.)

Plaintiffs mistakenly contend that this APA rulemaking is evidence of DOJ's use of its APA exemption to promulgate regulations having nothing to do with registration. Instead, it is evidence that DOJ used its statutory APA exemption where authorized, and otherwise complies with the APA in conducting rulemaking. The section 5471 definitions apply only to the registration of bullet-button assault weapons. These definitions will extend to purposes beyond registration if, and only if, DOJ completes the APA rulemaking process for the proposed regulation described above, and OAL approves the proposed regulation.

B. The Regulations Are Within the Scope of the Authority Delegated by the Legislature and Are Reasonably Necessary to Implement the Registration

Plaintiffs wrongly 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.' Opp. at 6-7.) But 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); *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, 391 (*Jones*) [grant of regulatory authority to "administer" the authorizing statute is equivalent to authority to "carry out" or "implement" the statute].)

The APA exemption authorizes DOJ to make any and all rules 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. They help DOJ ensure that only eligible weapons are registered by only eligible applicants, through a transparent, reliable process.

1. Definitions of Terms (Third Cause of Action)

Plaintiffs contend that DOJ lacks the authority to define terms relating to what is required or not permitted to be registered, because the statute sets forth the weapons subject to registration in a different section from the registration requirement. (Pls.' Opp. at 7-8.) This misapprehends an administrative agency's power to make regulations implementing a statutory provision, which are "the substantive product of a delegated legislative power conferred on the agency." (*Yamaha Corp.*, *supra*, 19 Cal.4th at p. 8.) 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 identify the weapons that may be registered. The registration provision refers to assault weapons "as defined in Section 30515." It is thus entirely reasonable for implementing regulations to define the terms used in that section, none of which are statutorily defined (except for "fixed magazine").[2] It is also reasonable for implementing regulations to define terms in that section describing weapons that are ineligible for this registration period, by virtue of having been previously prohibited and subject to prior registration requirements. (See, e.g., Pen. Code, § 30515, subd. (a)(3); see also Demurrer at 12.)

2. Reorganization of Regulatory Definitions (First Cause of Action)

The five preexisting definitions that are the subject of Plaintiffs' First Cause of Action appear in the registration definitions, in the same substantive form as before. 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

[2] The definition of "fixed magazine" in section 5471 simply duplicates the statutory definition. (Cf., Pen. Code, § 30515, subd. (b), and Cal. Code regs., tit. 11, § 5471, subd. (p).)

"Detachable magazine," "Flash suppressor," and "Pistol grip that protrudes conspicuously beneath the action of the weapon") consist of the preexisting definitions plus examples of items that would fall within those definitions. (§ 5471, subds. (m), (r), (z); Demurrer at 13.) Transfer of the preexisting definitions to the registration definitions is related to and reasonably necessary for the registration process, to avoid the confusion that would stem from having two separate sets of definitions apply, at the same time, when determining what weapons may be registered. If Plaintiffs' objection is really that the preexisting definitions no longer apply to "the identification of assault weapons pursuant to Penal Code section 30515," the current APA rulemaking process described above will apply all of the section 5471 definitions—including the five preexisting definitions—to the identification of assault weapons pursuant to Penal Code section 30515, for all purposes.

3. Bullet-Button Shotgun Registration (Second Cause of Action)

Plaintiffs have identified no provision of the assault weapons law that actually conflicts with the requirement to register bullet-button shotguns. Instead, Plaintiffs rely on the summary of the registration requirement provided in an assembly floor analysis to interpret it the scope of that provision. (Pls.' Opp. at 12.) But this analysis cannot override the plain language of the statute. (See *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 894 [rejecting statutory interpretation based on description of legislation offered in Legislative Counsel's digest, when "*the actual text of the bill*" did not conform to that description (emphasis in original)].) Plaintiffs' reliance on the titles of chapters, articles, sections, and subdivisions of the Penal Code (as containing the phrase "assault weapons") is also misplaced, as "the Supreme Court has cautioned that one cannot use the title of the subdivision in which a particular statute is found to derive any meaning whatsoever with respect to the proper interpretation of the statute." (*Faulder v. Mendocino County Bd. of Sup'rs* (2006) 144 Cal.App.4th 1362, 1377–1378, citing *Santa Clara Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 242–243; see also *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1119 (*Wasatch Property Management*) ["[t]itle or chapter headings are unofficial and do not alter the explicit scope, meaning, or intent of a statute," citation omitted].) And, the placement of the registration requirement in the Assault

Weapons Control Act does not mean that registration is necessarily limited to statutorily defined assault weapons. (See *Wasatch Property Management, supra,* 35 Cal.4th at p. 1120 ["absent explicit language limiting section 1954.535 to rent-controlled jurisdictions, its placement within the Costa Hawkins Act does not persuade us that its application is so limited"].)

Plaintiffs also point out that DOJ is not applying the registration requirement to "every firearm lacking a fixed magazine." (Pls.' Opp. at 12.) But DOJ is not required to interpret every statutory provision as broadly as possible. Nor would a difference between the statutory definition of assault weapon and the registration requirement mean that DOJ's interpretation conflicts with the law. (See *Robin J. v. Superior Court* (2004) 124 Cal.App.4th 414, 424 [where combined effect of challenged regulation with authorizing statute and another statute "challenges the bounds of common sense, this effect alone does not mean that the regulation is in conflict with either" statute].) In fact, as set forth in the demurrer, the registration requirement itself uses language that is broad enough to include bullet-button shotguns. (Demurrer at 14-15.) And, Plaintiffs do not dispute that the Legislature has the power to require registration of bullet-button shotguns. (*Ibid.*) Because DOJ's interpretation is consistent with the registration requirement and is reasonably necessary to effectuate it, the shotgun registration regulations pass muster.

4. Removal of Magazine Release Device (Eighth Cause of Action)

DOJ opposes Plaintiffs' arguments that the regulation prohibiting post-registration modification of the magazine release device is not related to registration. This regulation prevents registrants from converting registered weapons into weapons that are not eligible for registration, eliminating a potential loophole that would damage the integrity of the registration process. (Demurrer at 16.) Removal of the bullet button from a registered weapon creates a registered weapon that should not have been registered. It also converts the weapon into an assault weapon that, according to its features, should have been registered by January 1, 2001.[3]

[3] Removal of the bullet button would transform the weapon into a true quick-release weapon, with "the capacity to accept a detachable magazine," as previously defined under the assault weapons law. If the weapon still has one of the additional qualifying features, it would fall into the category of assault weapons originally subject to restrictions on sale and possession as of January 1, 2000, which were required to have been registered by January 1, 2001. (See former Penal Code §§ 12276.1 (2000) [introduction of feature-based definitions of assault weapon, (continued…)

(Pen. Code, § 30900, subd. (a)(2).) The regulation does not prohibit all post-registration modifications; rather, it prohibits modification of the specific feature of the weapon that qualifies it for this particular registration process. (Demurrer at 16.)

The regulation is directly related to the registration process because it helps prevent the registration process from being used to circumvent longstanding restrictions on the sale, possession, and manufacture of weapons that have previously been classified as assault weapons. This potential abuse of the regulation process is precisely the type of activity the Legislature gave DOJ the power to address through APA-exempt rulemaking. "[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." (*Jones*, *supra*, 2 Cal.5th at p. 399, citation omitted.) The authorizing statute need not set forth every component of an agency's implementing regulations. "To conclude that . . . the Legislature [must] define in advance every problem it expects an agency to address is to suggest that the Legislature had little need for agencies in the first place." (*Id*., *supra*, 2 Cal.5th at p. 398.) The prohibited modification is akin to the manufacture of a prohibited weapon, and nothing in the assault weapons law requires DOJ to permit the registration process to be used for such an activity.

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

Plaintiffs contend that even if the assault weapons law does not restrict DOJ's authority to require that a firearm lacking a serial number is not eligible for registration until one is applied, another statute does. However, the fact that another statute requires serial numbers for homebuilt firearms does not limit DOJ's authority to require a serial number for registering homebuilt bullet-button weapons. (See *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 182-183 [upholding agency's regulation of quantity discounts for beer even though separate statute governed quantity discounts on milk and wine].) Although Plaintiffs contend that a serial number

(…continued)
effective January 1, 2000], 12285, subd. (a) (2000) [requiring registration of assault weapons as defined under former section 12276.1 within one year].)

"is not essential to the registration process," they fail to explain how registration of an unserialized firearm would be effective. In fact, registration of weapons without serial numbers would be ineffective because law enforcement cannot positively identify an unserialized weapon if it is encountered in the field, used in a crime, or if the registrant is subsequently prohibited from possessing firearms and law enforcement needs confiscate the weapon. DOJ has the power to make rules to address unforeseen problems or specific situations not addressed in statute to make the process coherent and effective, and the regulations are thus a valid exercise of DOJ's APA exemption. (See *Jones*, *supra*, 2 Cal.5th at p. 398.)

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

Plaintiffs argue that the bar on registration by persons who are prohibited from possessing firearms is merely a "proscription on certain activity by individuals," and that DOJ thus lacks the power to enforce this prohibition. To the contrary, persons who are not eligible to register may try to do so, and DOJ has the power to prevent this, as part of its statutory duty to implement the registration scheme. It is not plausible that the Legislature intended to stop DOJ from preventing registrations by prohibited persons. Such an interpretation would directly undermine the public safety interests the Legislature sought to protect through the assault weapons registration scheme. DOJ has the power to make APA-exempt regulations supporting this function—including requiring information necessary to complete the eligibility check—because it relates directly to the registration process. (See *Jones*, *supra*, 2 Cal.5th at p. 398.)

7. Requirement for Photos (Fifth Cause of Action)

Plaintiffs contend that a photograph is a "depiction" rather than a "description" and that the regulation requiring clear digital photographs is therefore outside of DOJ's rulemaking authority. This argument is foreclosed. "An administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate." (*PaintCare*, *supra*, 233 Cal.App.4th at pp. 1298-99.) Clear digital photos help to uniquely identify the weapon, as required by statute. They also allow DOJ to confirm that the weapon described in the application is actually eligible for registration. It is possible for an applicant to unintentionally provide inaccurate information

about a weapon, such that the weapon seems to satisfy the registration requirements, based only on the written description submitted by the applicant. A photo of the weapon would allow DOJ to discern that it is not eligible for registration (e.g., because the weapon does not actually have a bullet button). The photo requirement is thus directly related to and reasonably necessary for the registration process.

8. Joint Registration (Sixth Cause of Action)

Plaintiffs contend that because the assault weapons law provides for joint registration in a section (Pen. Code, § 30955) that is separate from the registration requirement (*id*. § 30900, subd. (b)(1)), DOJ has no authority for the joint registration regulations (§ 5474.1, subd. (b)). But DOJ is required by statute to offer joint registration and thus has the authority to issue rules making it available and preventing it from being misused. (See *Jones*, *supra*, 2 Cal.5th at p. 399 [Legislature may "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," citation omitted].) Plaintiffs' opposition makes no mention of Plaintiffs' challenge to the proof-of-address requirements (§ 5474.1, subd. (c)), but such an objection would be 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.

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

Contrary to Plaintiffs' interpretation, the "[e]xcept as may be required by law" provision in section 5473, subdivision (b)(1) does not render the non-liability clause "meaningless and entirely unnecessary." (Pls.' Opp. at 15.) Rather, it provides that the non-liability clause applies only to the extent possible under other applicable laws. Plaintiffs cite no authority for their assertion that DOJ "cannot exempt itself from liability." (*Id*. at 16.) The regulation allows DOJ to provide public access to the electronic registration system without undue legal risk, and thus directly supports, is consistent with, and is reasonably necessary for the registration process.

CONCLUSION

For the foregoing reasons, the Court should sustain the demurrer.

Dated: January 23, 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 23, 2018, I served the attached **REPLY IN SUPPORT OF DEFENDANT'S DEMURRER** by transmitting a true copy via electronic mail, addressed as follows:

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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 23, 2018, at San Francisco, California.

Susan Chiang
Declarant

Signature

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