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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' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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

Action Filed: September 7, 2017

INTRODUCTION

While DOJ might have some leeway to "fill up the details" of statutes where it is clearly authorized to make regulations, (Defendants Mem. Of Ps & As ISO Demurrer ("Demurrer") at 10), it does not have carte blanche to adopt any regulation via the APA exemption in subdivision (b) of Penal Code § 30900 ("Subdivision (b)") that may tangentially relate to the general subject matter of that provision. Because DOJ's challenged regulations exceed DOJ's APA exemption, they are void and should be preliminarily enjoined, as come July 1, 2018, their enforcement will irreparably harm Plaintiffs and the public.

ARGUMENT

I. PLAINTIFFS APPROPRIATELY SEEK DECLARATORY RELIEF

If any doubt remained as to whether Plaintiffs may seek declaratory relief here following their Opposition to Defendants' Demurrer ("Opp. Demurrer"), (*Id.* at 16-18), that doubt has been eliminated by Defendants themselves. The very case Defendants rely on to argue that Plaintiffs should have brought this action as an administrative writ expressly provides that it is a "well-settled rule that administrative mandamus is not available to review quasi-legislative actions of administrative agencies." (Defendants' Opposition to Plaintiffs' MPI ("Opp. MPI") at 8-9 (citing *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 168).) Unlike "quasi-judicial" or "adjudicatory" proceedings, quasi-legislative acts like adopting regulations are "reviewable only by action for declaratory relief" or "traditional mandamus." (*Id.* at 168-169.) Because, as Defendants recognize, "DOJ's regulations are quasi-legislative rules," (Opp. MPI at 9), Plaintiffs *cannot* challenge them via an administrative writ.

Defendants' reliance on an inapposite footnote in *Pacific Legal Foundation* is misplaced. While it may be that Cal. Gov't Code § 11350 "has no application" to regulations that *are* exempt from the APA, (Opp. MPI at 8; *Pacific Legal Foundation*, *supra*, 33 Cal.3d 158, 169 fn. 4), it certainly does in a challenge concerning *whether* regulations are exempt from the APA. (*See Morales v. California Dept. Corrections and Rehabilitation* (2008) 168 Cal.App.4th 729 [court evaluated a declaratory relief action under Cal. Gov't Code § 11350 to determine whether administrative rules qualified for an APA exemption, holding they did not].)

As Plaintiffs have explained, Defendants cannot shield their regulations from a declaratory relief action by simply labeling their circumvention of the APA an "administrative decision." (Opp. Demurrer at 16-17.) Again, DOJ's adoption of regulations without complying with the APA is precisely the type of agency action that is 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. Accordingly, Plaintiffs' action for declaratory relief is proper here.

II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION SHOULD BE GRANTED

A. Plaintiffs Are Likely to Succeed on the Merits

1. DOJ's Rulemaking Authority Is More Limited than Defendants Assert

While Defendants are correct that an agency has discretion to "fill up the details" of a statutory scheme with regulations, (Opp. MPI at 9; *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 356), the agency remains restricted to "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.) For that rulemaking power to be exempt from the APA, the authorizing statute must expressly say so. (Gov. Code § 11346; *Winzler & Kelly v. Dept. of Indus. Relations* (1981) 121 Cal.App.3d 120, 126-127.) Such an exemption should be unmistakable, for "[w]hen the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language." (*United Sys. of Ark. v. Stamhon* (1998) 63 Cal.App.4th 1001, 1010.) And "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." (*California Sch. Bds. Ass'n v. State Bd. Of Educ*. (2010) 186 Cal.App.4th 1298, 1328.

So while government agencies enjoy some leeway to "fill up the details" when making regulations that comply with the APA, no such deference is given when there is a question as to *whether* their regulations fall within the scope of an APA exemption. In any event, even if a regulation qualifies for an APA exemption, "an agency does not have discretion to promulgate regulations that are inconsistent with the governing statute, alter or amend the statute, or enlarge

its scope." (*Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 974). "If the court concludes that the administrative action transgresses the agency's statutory authority, it need not proceed to review the action for abuse of discretion; in such a case, there is simply no discretion to abuse." (*Association for Retarded Citizens v. Dept. of Developments Services* (1985) 38 Cal.3d 384, 39; See also *Morris v. Williams* (1967) 67 Cal.2d 733, 748.)

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

DOJ's APA exemption only extends to regulations that, as Defendants themselves aptly describe it, implement the "registration process" for "assault weapons." (Opp. MPI at 10.) For that is what the provisions of Subdivision (b) exclusively address, (*see* Pen. Code § 30900, subd. (b)(1)-(4)), and DOJ's APA exemption is expressly limited to "implementing this [Subdivision (b)]." (Pen. Code § 30900, subd. (b)(5).)

As specifically explained below, DOJ's regulations do not merely "fill up the details" of the registration process, as Defendants contend. (Opp. MPI at 9.) In fact, none of the challenged regulations has anything to do with the registration process, i.e., *how* to register or establishing the related infrastructure to register. Rather, they address: (1) definitions found in wholly separate statutes for *what* firearms may or must be registered and (2) *who* qualifies for registration and *what* proof they must provide. (Cal. Code Regs., tit. 11, §§ 5469-5478.)[1]

As such, they are not of a subject matter that qualifies them for the APA exemption provided in Subdivision (b). To the extent there is a question about that, it should be resolved in favor of the APA applying. (*California Sch. Bds. Ass'n*, *supra*, 186 Cal.App.4th at 1328.) But, even if they otherwise qualified for the APA exemption, every one of the challenged provisions illegally alters the scope of a statute and would nevertheless be void for this reason alone. (*Slocum*, *supra*, 134 Cal.App.4th at 974.)

/ / /

[1] Defendants also suggest that Plaintiffs have waived their argument that they are "likely to succeed on their challenge to the regulation prohibiting post-registration alteration to the bullet button." (Opp. MPI at 11 fn. 5.) But Plaintiffs are simply not seeking an injunction against the post-registration restrictions at this time, and will still challenge the restriction on its merits.

a. DOJ's Improper Adoption of Definitions (Third Cause of Action)

Defendants assert that DOJ was within its authority to adopt dozens of definitions for "assault weapon" terms using its APA exemption because people need to know which firearms do and do not qualify for registration. (Demurrer at 11-13; See also Opp. MPI at 12-13.) But that assertion shows precisely why those definitions do *not* meet DOJ's APA exemption.

These regulations do not concern *how* to register, but rather *what* to register. As explained, DOJ's APA exemption is confined to regulations implementing Subdivision (b), the provisions of which exclusively concern the registration *process*. Neither Subdivision (b) nor the statute in which it appears, Section 30900, is a definitional statute. In fact, Subdivision (b) expressly acknowledges that the firearms needed to be registered are those "***as defined*** in Section 30515." DOJ's definitions, therefore, affect the scope of and thus implement Section 30515, not Subdivision (b). As such, they are not within the scope of DOJ's APA exemption.

Defendants' description of these definitions as being limited to registration purposes and thus not affecting Section 30515, (Opp. MPI at 12), does not change this. For, it relies on a false distinction. By declaring what firearms meet the definition of what can and cannot registered, DOJ is necessarily altering the meaning of "assault weapon" under Section 30515, as Subdivision (b) expressly states it is those firearms as defined in Section 30515 that must be registered. That it cannot do. (*Slocum*, *supra*, 134 Cal.App.4th at 974.)

b. DOJ's Improper Repealing of Definitions (First Cause of Action)

Defendants' claim that the five "assault weapon" term definitions previously found in 11 CCR § 5469 were not repealed but just "transferred to a new section containing all of the registration definitions," (Opp. MPI at 11), is false. As Plaintiffs have explained, (Opp. Demurrer at 7-9), prior to DOJ amending it, Section 5469 expressly stated that those "definitions apply to terms used in the identification of assault weapons pursuant to Penal Code section 30515," (RSO ISO Opp. Demurrer, Exhibit D). Yet, the regulation in which those definitions now appear only applies "[f]or purposes of Penal Code section 30900 Articles 2 and 3 of this Chapter," i.e., for registration, *not* identification purposes. (Cal. Code Regs., tit. 11, § 5471.) So those definitions no longer apply to terms used in Section 30515, as they previously did. In other words, they have

been repealed for that purpose.

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." (RSO ISO Opp. Demurrer, Exhibit C.) There certainly were before DOJ amended Section 5469.

Subdivision (b) only affords DOJ the authority to "adopt" regulations, not repeal them, Pen. Code, § 30900, subd. (b)(5).), and the repealing of regulations is subject to the APA (Gov. Code, § 11346.5.) Even if *repealing* regulations were within the scope of DOJ's APA exemption, it certainly does not extend to repealing definitions found in regulations that were adopted under the APA, (RSO ISO Opp. Demurrer, Exhibit E), to implement statutes other than Subdivision (b). Because that is precisely what Section 5469 does, Plaintiffs will prevail in their challenge to it.

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

As explained in detail in Plaintiffs' Opposition to Demurrer, (*Id*. at 10-12), not only is Defendants' reading of Penal Code section 30900(b)(1) as requiring registration of certain non-"assault weapon" shotguns contrary to the plain language of that statute, as well as legislative intent, but it would lead to absurd results. It 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.

This is supported by the legislative history and statutory context. AB 1135 and SB 880, the bills that created 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 all of its provisions apply exclusively to "*assault* weapons." Section 30900, which contains Subdivision (b), is part of

Article 5, which is titled "Registration of Assault Weapons and .50 BMG Rifles and Related Rules." And all three statutes appear in Chapter 2, titled "*Assault Weapons* and .50 BMG Rifles."

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.)

Because Defendants readily concede that the shotguns they contend must be registered are *not* "assault weapons," (Opp. MPI at 13) ,11 C.C.R. §§ 5470, subd. (a) and 5471, subd. (a) do not qualify for Subdivision (b)'s APA exemption are thus void.

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

11 C.C.R. section 5474.2's requiring that individuals with home-built firearms first obtain and inscribe a serial number on their firearm has nothing to do with the registration process in Subdivision (b), i.e. *how* to register a firearm. Instead, the requirement only limits *what* firearms can be registered. No Penal Code section requires firearm owners to inscribe lawfully owned firearms with a serial number at this time. By requiring registrants to do so, DOJ is expanding the scope of California law. (Mot. Prelim. Inj. ("MPI") at 15-16.) Plaintiffs do not dispute that DOJ has the authority to require that applicants *provide* an existing serial number. But DOJ cannot require someone to *create* that serial number.

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

Defendants argue that DOJ's regulation requiring individuals to provide their military ID number, U.S. citizenship status, place of birth, country of citizenship, and alien registration number properly implements Subdivision (b) because it is required under Penal Code section 30950. (Opp. MPI at 14.) Specifically, Defendants state that such information "is required to confirm eligibility." (*Ibid*.) But this is contradicted by Defendants, as they state that DOJ is "required by law to maintain an online database (the Armed Prohibited Persons System), ***which cross-references*** . . . ***criminal history records*** to determine persons who have been, or will become, prohibited." (Opp. MPI at 20 (emphasis added).) This system operates independently

from any required background check. In any event, it expands the scope of Subdivision (b).

f. Clear Digital Photos (Fifth Cause of Action)

A photograph is a *depiction*, note merely a *description* of the firearm. Subdivision (b) only calls for the latter, and only to the extent necessary to identify the firearm "uniquely." (Pen. Code, § 30900, subd. (b)(3).) DOJ is once again requiring applicants to *create*, rather than *describe*, the information to be provided in the registration application pursuant to Section 5474, subd. (c), which also necessarily requires access to expensive equipment. As a result, the challenged regulation unlawfully expands the scope of Subdivision (b) is therefore void.

g. Joint Registration (Sixth Cause of Action)

By limiting the term "family members residing in the same household," Section 5474.1 dictates *who* may register. But Subdivision (b) only concerns *how* to register. Any doubt on that score should be resolved in favor of the APA applying. (See *California Sch. Bd.s Ass'n, supra*, 186 Cal.4th at 1328.) Defendants cannot claim the Legislative intent is clear as to the meaning of that term when DOJ previously acknowledged that had they intended so, "they should have been statutorily stated in a much clearer manner." (RSO ISO Opp. Demurrer, Exhibit E.)

Likewise, Section 5474.1, subd. (c)'s requirement that joint-registrants provide "proof of address" does not concern *how* individuals are to register their firearms. Instead, the restriction only serves to limit who may jointly-register, and thus improperly alters the statutory requirements. (Pen. Code, § 30955.)

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

Defendants do not defend DOJ exempting itself from liability, and instead attempt to obscure the specific problem with Section 5473, subd. (b)(1)'s non-liability clause by labeling it as innocuous sounding "terms of use." (Opp. MPI at 15.) By that logic, Defendants could label any requirement as among its "terms of use" and claim that such are exempt from the APA. Regardless, DOJ cannot broadly exempt itself from statutory liability as it has done.

B. Enforcement of the Challenged Regulations Irreparably Harm Plaintiffs

Plaintiffs have and will continue to suffer irreparable harm if an injunction does not issue. Come July 1, 2018, Plaintiffs must choose between compliance with DOJ's illegal regulations or

risk felony prosecution for unlawfully possessing an "assault weapon." (MPI at 18-20.) What's more, by denying the public of its statutory right to be heard, the illegal adoption of the challenged regulations has brought irreparable injury to the important, democratic values the APA was designed to serve. (See *Tidewater, supra*, 14 Cal.4th at pp. 568-569 [reasoning that the APA gives "those persons or entities whom a regulation will affect have a voice in its creation"]; *Cal. Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 507-508 [APA protects against "bureaucratic tyranny"].) Continued enforcement of the regulations only compounds that harm. For allowing the undemocratically adopted regulations to remain in force sends a message to the public that its government cannot be trusted to respect the processes that are meant to ensure an accountable government. These harms are far-reaching, they are ongoing, and they cannot be remedied financially. In short, they are the very sorts of harms that make preliminary injunctive relief appropriate. (*Pellissier v. Whittier Water Co.* (1922) 59 Cal.App. 1, 6; See also Code Civ. Proc., § 526, subd. (a)(5).)

Defendants obfuscate the issue, suggesting the harm Plaintiffs seek to redress is merely the past denial of their statutory right to be heard under the APA. (Opp. MPI at 17-18.) Based on that fundamental misunderstanding of Plaintiffs' injury, they claim that Plaintiffs' injury would not be remedied by preliminary relief because "the lack of an injunction would result in the continued application of the regulations to the registrations process, not the loss of opportunity to comment on proposed regulations." (Opp. MPI at 17.) But the "continued application of the regulations" is precisely the harm Plaintiffs complain of. That is, if Plaintiffs are to succeed on the merits, "continued application of the regulations" forces Plaintiffs to comply with *unlawful regulations or risk criminal prosecution*—a harm for which there is no adequate remedy at law.

Finally, Defendants argue that, because the Legislature may exempt regulations from the APA's requirements, "[a]ny lack of opportunity to comment reflects the legislative intent that DOJ promulgate registration rules without formal public comment procedure," and is not irreparable harm. (Opp. MPI at 18.) But, even assuming Plaintiffs' injury were limited to the denial of their right to be heard, this argument fails. For it necessarily assumes that the challenged regulations are within the scope of the APA rulemaking exemption. (*Ibid.*) If Plaintiffs are likely

to succeed on the merits of their APA claims, however, the regulations must *not* be within the scope of the exemption. If Plaintiffs are likely to succeed, Defendants cannot hide behind the "Legislature's intent" to discount the very real harms they have done to Plaintiffs and the public.

C. The Balance of Harms Tips Sharply in Favor of Granting Preliminary Relief

Defendants further obfuscate the issue by arguing that an injunction will force DOJ to "redesign" their registration system, requiring the investment of significant time and resources that Defendants argue DOJ currently lacks. (Opp. MPI at 18-19; Graham Decl. Supp. Oppn. ("Graham Decl."), ¶¶ 19-21.) The argument is misleading. For enjoining the enforcement of the challenged regulations will have little, if any, impact on DOJ's electronic registration system. And to the extent DOJ now has limited resources available to make any necessary tweaks to its system, such is the result of the agency's own malfeasance.

Defendants do not explain how enjoining the bulk of the challenged regulations would have any impact on the electronic registration system. They merely state that "[d]epending on the scope of the injunction DOJ would likely need to redesign the electronic registration system that is required by law [citation omitted] before accepting further registrations. (Opp. MPI at 18-19, citing Graham Decl., ¶ 19.) Defendants explain that such a delay could lead the DOJ to run out of time to process registrations and, ultimately, threaten public safety because law enforcement relies on registrations. (Opp. MPI at 19-20.) But Defendants point only to a single example of any challenged regulation that *could* impact DOJ's registration system if enjoined. That is, they suggest that 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 must find an alternative method of confirming eligibility to register." (Opp. MPI at 19, citing Graham Decl., ¶ 22.) But Defendants do not explain how enjoining the requirement that individuals provide personal information beyond that required by subdivision (b) would have any impact on DOJ's ability to determine whether a registrant is prohibited. And they cannot. For in Defendants' own words, DOJ can already "cross-reference 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." (Opp. MPI at 20.) Nothing about the injunction Plaintiffs seek would prevent DOJ from continuing to conduct such background checks.

For the remaining challenged regulations, an injunction would hardly invite the sky-is-falling scenario that Defendants describe. (See Opp. MPI at 18-20.) Enjoining requirements that individuals register "bullet-button" shotguns, engrave DOJ-approved serial numbers on certain home-built firearms, and provide clear digital photographs of their firearms involves no change to DOJ's electronic registration system. Rather, such an injunction would simply mean that individuals need not provide such at this time. To the extent uploading digital photographs is currently a required field in the DOJ's electronic system, it merely needs to be re-coded as an unrequired field or removed altogether. The suggestion that such would require a timely overhaul of the current system is dubious at best.

Likewise, an injunction against the newly enacted definitions would have little to impact on the registration system currently administered by DOJ. For nothing about the definitions directly impacts an individual's ability to submit a registration application. Instead, these regulations only limit who may jointly register and what firearms may be registered—neither of which change how registrations are submitted using DOJ's online system.

In any event, Plaintiffs warned Defendants on multiple occasions of their unlawful conduct. Defendants ignored those warnings, and they cannot now claim that they will suffer harm if an injunction issues against them. This is especially true given that Defendants developed the registration system ***before*** adopting the necessary regulations to do so. (Opp. MPI at 19; Graham Decl. ¶ 17 [stating that the registration program was developed in the six months prior to DOJ proposing the challenged regulations].) Therefore, any burden Defendants may suffer will be a direct result of their own clear pattern of malfeasance.

Dated: January 23, 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 23, 2018, I served the foregoing document(s) described as:

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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:

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Attorneys for Defendants

X (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.

Executed on January 23, 2018, at Long Beach, California.

/s/Laura Palmerin
Laura Palmerin