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Attorneys for Plaintiffs

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 WRIT OF MANDATE

Hearing Date: TBD
Hearing Time: TBD
Judge: Mark Snauffer
Department: 501

Action Filed: September 7, 2017
Trial Date: November 26, 2018

INTRODUCTION

Relying on general rules and platitudes, Respondents essentially argue that DOJ has carte blanche to adopt any regulation via the APA exemption in subdivision (b) of Penal Code § 30900 ("Subdivision (b)") that might tangentially relate to the general subject matter of that provision. They likewise dismiss any concerns about improperly expanding statutory provisions on the same grounds. Because each of the Challenged Regulations either does not qualify for Subdivision (b)'s APA exemption, or unlawfully alters the scope of statutory law, they are invalid and a writ should issue enjoining each, as come July 1, 2018, their enforcement will irreparably harm Plaintiffs and the public.

ARGUMENT

I. THE DECLARATORY RELIEF PETITIONERS SEEK IS DISCRETIONARY

Petitioners seek declaratory relief only to the extent that the Court finds that granting such relief is procedurally necessary to remedy Petitioners' harm. Should the Court find that issuance of the writs of mandate that Petitioners simultaneously seek are sufficient to preclude the DOJ from enforcing the Challenged Regulations, Petitioners would forego the declaratory relief.

II. THE WRITS OF MANDATE PETITIONERS SEEK SHOULD ISSUE

A. DOJ's Rulemaking Authority Is More Limited than Respondents Assert

While Defendants are correct that an agency has discretion to "fill up the details" of a statutory scheme with regulations, (Oppn. to V. Pet. Writ Mandate ("Oppn.") 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 generally 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. To the contrary, deference is given to application of the APA.

In any event, "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. This is so regardless of whether a regulation qualifies for an APA exemption.

Respondents greatly exaggerate the deference owed by this Court to their interpretation on whether the Challenged Regulations violate such edicts of legislative supremacy. The final word on questions of statutory interpretation always rests with the judiciary. (*New Cingular Wireless PCS, LLC v. Pub. Utils. Comm.* (2016) 246 Cal.App.4th 784, 671, citing *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 11.) The rationale for deference is strongest when the challenged action by the agency results from a rulemaking decision within the authority delegated to the agency (*id.* at pp. 11–12), where the agency interprets one of its own regulations (*Pac. Gas and Elec. Co. v. Pub. Utils. Commn.*, (2015) 237 Cal.App.4th 812, 840; *Util. Consumers' Action Network v. Pub. Utils. Commn.* (2010) 187 Cal.App.4th 688, 697–698). "Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Yamaha, supra,* 19 Cal.4th at p. 11.) Courts must, in short, independently judge the text of the statute. (*Id.* at 7.)

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B. 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." (Oppn. 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 [S]ubdivision [(b)]." (Pen. Code § 30900, subd. (b)(5).)

As explained in detail below, DOJ's regulations do not merely "fill up the details" of the registration process, as Respondents contend. (Oppn. 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 to register. (Cal. Code Regs., tit. 11, §§ 5469-5478.)

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.) And, in any event, 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. Illegal Repealing of Definitions

Respondents do not dispute Petitioners' view that Subdivision (b) only affords DOJ the authority to "adopt" regulations, not *repeal* them, [(Pen. Code, § 30900, subd. (b)(5), See Opening Br. at 11-12]. Instead Respondents claim DOJ did not repeal the five definitions previously found in Section 5469,[1] but just "moved" them to Section 5471. (Oppn. at 10). That is false.

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," ([See

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

Petition for Writ of Mandate ("Petition") at Ex. A, p.1 of 15.)]). Yet, the regulation in which those definitions now appear (Section 5471) 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.) Accordingly, those definitions appear in a regulation that no longer directly applies to Section 30515, when they previously appeared in one that did. In other words, they have been repealed for that purpose.

But, it is not just that DOJ lacks the authority to repeal regulations under Subdivision (b)'s APA exemption. Even if the scope of DOJ's APA exemption contemplated *repealing* regulations, it still does not extend to repealing (or adopting) definitions found in regulations implementing statutes other than Subdivision (b); particularly ones that were adopted in compliance with the APA. (See Opening Br. at 12). Yet, that is precisely what DOJ's deletion of Section 5469 does.

Despite these very points being raised by Petitioners in the Petition, (See Petition ¶¶ 75-76), and in their brief, (See Opening Br. at 11-12). Respondents fail to expressly claim that the definitions now appearing in Section 5471 still apply to Penal Code section 30515. That is likely because they cannot. For Section 5471 only references Subdivision (b) as authorizing its adoption. (See Petition at Ex. A, p.2 of 15). And Subdivision (b)'s APA exemption is limited to implementing only its provisions, not those of a separate statute, like Penal Code section 30515.

2. Illegal Requirement to Register "Bullet Button" Shotguns

If a "bullet button shotgun" does not meet the statutory definition of "assault weapon" then it is not required to be registered under Penal Code section 30900(b)(1). Respondents resist this truth with a tortured interpretation of Penal Code section 30900(b)(1) that they argue demands registration even of certain non-"assault weapon" firearms, specifically identifying "bullet button shotguns." (Oppn. at 13-14). But, then, mere paragraphs later, Respondents abandon that position, and their credibility, by declaring that "bullet button shotguns" are indeed "assault weapons." (Oppn. at 14). This cocktail of contradictions and shoddy statutory analysis suggests that DOJ did not base its decision on any cogent legal theory, but that Respondents are instead attempting to make post-hoc justifications for DOJ's clear legal errors. In any event, Respondents are wrong on both of their contradictory arguments for why "bullet button shotguns"

must be registered.

a. "Bullet Button Shotguns" Are Not "Assault Weapons"

Despite previously conceding in two separate briefs that "bullet button shotguns" do not meet the definition of an "assault weapon" (See Resp. Dem. at 14.) ["This is so even though bullet-button shotguns are not statutorily defined as assault weapons."]; (Oppn. at 13) ["It does not matter that bullet-button shotguns are not defined as assault weapons by statute."]), Respondents now argue that such firearms are "assault weapons." They were right the first time.

As Respondents correctly point out, a semiautomatic shotgun qualifies as an "assault weapon" when it "has the ability to accept a detachable magazine." ([(Oppn. at 13)]; Pen. Code, § 30515, subd. (a)(7).) The entire purpose of a "bullet button" is to cause the firearm to which it is affixed to no longer have a "detachable magazine" and thus fall outside of the "assault weapon" definition. (See Opening Br. at 7). As such, "bullet button shotguns" are, by definition, not "assault weapons."

To conclude otherwise, as Respondents do, would render the definitional changes that SB 880 and AB 1135 made to rifle and handgun "assault weapons" meaningless. For, prior to those bills becoming law, certain rifles and pistols likewise had to have "the capacity to accept a detachable magazine" to be an "assault weapon." (See Req. Jud. Not. In Supp. of Resp. Dem. Ex. 1, p. 2). Now, such a rifle or pistol is an "assault weapon" if it "does not have a fixed magazine." (Pen. Code, § 30515, subd. (a)(1), (4).) The sole and express purpose for this change was to prevent using a "bullet button" to take those firearms out of the definition of "assault weapon." (See Opening Br. at 7). But that change was never made to the "assault weapon" definition of shotguns. (Pen. Code, § 30515, subd. (a)(7).)

If the previous "detachable magazine" language—which is what is still used for semi-automatic shotgun "assault weapons"—already achieved that purpose, as Respondents claim, that would mean the SB 880 and AB 1135 definitional amendments were superfluous, which is not a reasonable proposition. Additionally, it would mean that the hundreds of thousands of "bullet button" rifles and pistols sold over the years were unlawfully transferred, despite DOJ allowing them to be. That is certainly not the case either.

In sum, "bullet button shotguns" were not "assault weapons" prior to SB 880 and AB 1135, and because the legislature left the "detachable magazine" language untouched for shotguns, they still are not. Contrary to Respondents' assertion, DOJ does not have the authority to graph SB 880 and AB 1135's amendment made to certain rifle and handgun "assault weapons" onto "bullet button" shotguns, as that is a decision for the legislature, one it did not take when presented with the opportunity.

b. "Bullet Button Shotguns" Do Not Need to Be Registered

Respondents' interpretation of Penal Code section 30900(b)(1) as requiring "bullet button shotguns" to be registered despite them not being "assault weapons" is demonstrably erroneous. If not "assault weapons," then there is no statute prohibiting their continued sale, transfer, and acquisition. In sum, Respondents' view of Penal Code section 30900(b)(1) would mean that the legislature intended to require "bullet button shotguns" to be registered by July 1, 2018, but still allow one to acquire such a shotgun on July 2, 2018, that would not have to be registered, as registration will have been closed by then. (Id.) Such an absurd result is foreclosed by the rules of statutory interpretation. (See *Barnes v. Chamberlain* (1983) 147 Cal.App.3d 762, 766 ("a construction that would create a wholly unreasonable effect or an absurd result should not be given"], *citing Dempsey v. Market Street Ry. Co*. (1943) 23 Cal.2d 110, 113.)

Even if there were some other statutory provision prohibiting the future acquisition of "bullet button shotguns," such firearms would still not need to be registered under Penal Code section 30900(b)(1) because they are not "assault weapons" and that statute's registration scheme applies exclusively to "assault weapons." Respondents' reading of that provision erroneously construes the word "including" to mean "in addition to." (Oppn. at 13-14). 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 clearly contrary to the legislative intent. Tellingly, no other previous registration has required non-"assault weapons" to be registered.

3. DOJ's Improper Adoption of Definitions

Respondents 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. (Oppn. 11-12). 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. 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, Penal Code 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—albeit indirectly since they do not reference it—implement Penal Code section 30515, not Subdivision (b). As such, they are not within the scope of DOJ's APA exemption.

As with the "bullet button shotgun" issue, Respondents have changed their position on the effect of these definitions. Previously, in response to Petitioners' claims that DOJ was over-stepping its bounds with these definitions, Respondents defended them as being limited to registration purposes and thus not affecting Section 30515, (Opp. MPI at 12). Now, however,

Respondents freely admit that these definitions "are necessary for implementing regulations to define the terms used in that section." (Oppn. 13). Altering a completely separate statute from Subdivision (b) is well beyond the scope of DOJ's APA exemption, particularly one that has nothing to do the registration process.

Respondents argue that defining these terms was necessary because there is only one term already defined by statute (Opp. MPI at 13). But, the fact that the legislature defined that term in a separate statute and did not expressly grant DOJ authority to alter definitions, some of which were already in existence, *see* discussion on former Section 5469 above, militates *against* Respondents' view of DOJ's authority here.

4. Illegal Requirement for Creating Serial Numbers

Petitioners do not dispute that DOJ has the authority to require that applicants *provide* an existing serial number. But DOJ cannot require applicants to *create* a serial number, at least not without adopting a regulation requiring such under the APA. For, Section 5474.2 is not part of the registration process, i.e. *how* to register. Instead, it only limits *what* firearms can be registered. As such, it does not qualify for Subdivision (b)'s APA exception.

Respondents admit that Section 5474.2 will be expediting Penal Code section 29180's serial number inscribing requirement deadline by one year. (Oppn. at 17, fn. 14). That is fatal to its validity. For, it is expressly expanding the scope of a statute. Respondents' defense that DOJ is not limited in making regulations by authority given in another statute, relying on a case upholding regulations for discounts on beer when there is a statute concerning such discounts for milk, (Oppn. at 17), is comparing apples and oranges. Here, the regulation covers the exact same firearms that the statute does and then some. (Penal Code section 29180).

5. Improper Non-Liability Clause

Respondents fail to explain how DOJ exempting itself from liability relates to the registration process. Even assuming DOJ could do so in a manner that does not curtail statutory law, it would have to do so in compliance with the APA. Its failure to do so dooms this provision.

6. Ultra Vires Mandatory Registrations Information

Respondents argue that Section 5474, subd. (a)'s citizenship records requirement beyond

what is called for in Subdivision (b) is necessary to confirm registrants' eligibility to possess firearms. (Oppn. 17-18). But nothing in Subdivision (b) *requires* DOJ to conduct a background check. It merely criminally penalizes ineligible registrants. (Pen. Code § 39000(b)(1).

Petitioners only defense of Section 5474, subd. (c)'s digital photo requirement is to point out that an agency is not limited to the exact provisions of a statute in implementing the statute. (Oppn. at 18). But, citing such a general rule does little to explain the parameters of an agency's authority. Requiring applicants to *create* information when the statute only demands that registrants *describe* such information, particularly when doing so requires access to expensive equipment, is beyond the scope of reasonable regulatory discretion.

7. Improper Joint Registration Restrictions

By limiting the term "family members residing in the same household," Section 5474.1 dictates *who* may jointly register. Likewise, Section 5474.1, subd. (c)'s requirement that joint-registrants provide "proof of address" limits *who* may jointly-register. (Pen. Code, § 30955.) But Subdivision (b) and its APA exemption only concern *how* to register. Respondents assert general platitudes about how they are authorized to do so. But, any doubt on that score must be resolved in favor of the APA applying. (See *California Sch. Bd.s Ass'n*, *supra,* 186 Cal.4th at 1328.) Platitudes are not sufficient to overcome that presumption.

8. Excessive Post-Registration Restriction

Petitioners have not waived their challenge to Section 5477, as Respondents contend. Both Petitioners' motion and memorandum of points and authorities in support thereof expressly state that it is being challenged. (See Pet. Not. of Motion for Writ); (Pet. Mem. Of Ps & As to Writ at 8). The reason Section 5477 is invalid is so patently obvious that it needs no significant analysis. Respondents concede that DOJ's APA exemption is limited to implementing the registration process under Penal Code section 30900(b)(1) (Opp. MPI at 7). While the scope of what that process entails may be open to debate, what happens *after* that process is, by definition, not part of it.

Section 5477 expressly states that "[t]he release mechanism for an ammunition feeding device on an assault weapon registered pursuant to Penal Code section 30900, subdivision (b)(1)

shall not be changed ***after*** the assault weapon is registered." As such, it has nothing to do with the registration process and, thus, does not qualify for Subdivision (b)'s APA exemption.

C. There Is No Dispute that a Writ of Mandate Should Issue Invalidating Any Challenged Regulation the Court Finds to Have Been Adopted Unlawfully

While they clearly contend that the Challenged Regulations are valid, Respondents do not dispute: (1) that DOJ has a ministerial duty to refrain from enforcing invalid regulations; (2) that Petitioners have a clear, present, and beneficial interest in the outcome of this proceeding; or (3) that Petitioners have no plain, speedy, or adequate remedy from the ongoing harm caused by any of the Challenged Regulations this Court may deem invalid. Accordingly, should the Court agree with Petitioners' that any of the Challenged Regulations was unlawfully adopted, a writ should issue invalidating that regulation and compelling DOJ to refrain from enforcing it.

Dated: April 12, 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 April 12, 2018, I served the foregoing document(s) described as:

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR WRIT OF MANDATE

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*
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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 April 12, 2018, at Long Beach, California.

/s/Laura Palmerin
Laura Palmerin