IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIFTH APPELLATE DISTRICT

DANNY VILLANUEVA, NIALL STALLARD, RUBEN BARRIOS, CHARLIE COX, MARK STROH, ANTHONY MENDOZA, AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, Plaintiffs and Appellants, 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 and Respondents.	Case No. F078062

APPELLANTS' REPLY BRIEF

Fresno County Superior Court, Case No. 17CECG03093
Honorable Mark W. Snauffer, Judge

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INTRODUCTION

This appeal is not moot, as DOJ contends. Arguably, every one of the Challenged Regulations remain in effect indefinitely, and certainly some of them do. Even if this appeal technically were moot, equity and the public interest tip in favor of the Court deciding the important issues raised in this matter.

DOJ gets the merits wrong, too. In response to the specific arguments Appellants have raised for why the Challenged Regulations are invalid, DOJ repeatedly rests on platitudes about agencies having broad rulemaking authority. It never seriously analyzes the problems Appellants raise with its having bypassed the APA or the Challenged Regulations' altering of statutes. DOJ's brief boils down to its premise that the rules must always favor DOJ. Because that is decidedly wrong, and for the reasons explained in Appellant's opening brief and below, the Court should overturn the trial court entirely.

ARGUMENT

I. THIS APPEAL IS NOT MOOT AND, EVEN IF IT WERE, THE EXCEPTIONS TO THE DOCTRINE OF MOOTNESS MAKE REVIEW APPROPRIATE

The Challenged Regulations impose many far-reaching changes to California law about the registration of certain "assault weapons" under Assembly Bill 1135 and Senate Bill 880. As explained in Appellants' Opening Brief, the regulations unlawfully set forth detailed criteria about the types of firearms that must be registered, who may register them, and the conditions and obligations of registration. (A.O.B. at pp. 31-48.) In response, DOJ argues that this appeal is entirely moot because the Challenged Regulations no longer

have any impact. (Resp. Br. at pp. 21-23.) This argument stems from the myopic view that the Challenged Regulations had relevancy only during the brief period that DOJ was accepting new registrations. This interpretation is simply wrong.

In fact, all the Challenged Regulations have a far-reaching impact that will continue to be felt as long as they are in force. At minimum, some of the regulations present ongoing controversies that are not resolved just because the registration window has closed. These live controversies require the Court's resolution.

A. This Appeal Is Not Moot Because the Challenged Regulations Present Real, Live Controversies

1. The Challenged Regulations Present an Ongoing Controversy Not Resolved Simply Because the Registration Period Ended

"An appeal should be dismissed as moot" only when "the occurrence of events renders it impossible for the appellate court to grant appellant *any effective relief*." (*Cucamonga United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479, italics added.) Even though the statutory registration period closed over a year ago, it is *not* the case that the Court could grant *no* effective relief here. To the contrary, the Challenged Regulations present a controversy that will persist indefinitely absent either legislative action or judicial intervention.

First, the Challenged Regulations will indefinitely present an issue for any person possessing an *un*registered firearm that arguably falls within the scope of the Challenged Regulations. If someone is charged with possession of an unregistered "assault weapon" today (or at any future time), law enforcement officers, prosecutors, and courts will no doubt look to the Challenged Regulations to determine

whether that firearm had to be registered or whether the registrant registered it properly.

Second, Appellants have reason to believe that there are countless registration applications *still pending* DOJ approval, even though they were submitted before the registration deadline. (See Req. Jud. Ntc., Ex. A.) The Challenged Regulations (and a ruling on their validity) could directly impact these pending applications.

Third, the DOJ is involved in a related lawsuit in federal court because its registration system crashed during the final days of the registration period—leaving many would-be registrants unable to submit their applications. (*Sharp v. Becerra* (E.D. Cal., June 19, 2019, No. 18-cv-02317) 2019 WL 2615754 at pp. *1-2.) The *Sharp* court recently ruled that the plaintiffs had alleged valid due process claims, acknowledging that DOJ's "own policies can support a finding of deliberate indifference" to plaintiffs' constitutional rights. (*Id.* at pp. *3-4.) Among other things, the *Sharp* plaintiffs are seeking an order re-opening registration "for a reasonable period of time beyond the statutory deadline of July 1, 2018." (Second Am. Pet. at p. 31, *Sharp v. Becerra* (E.D. Cal., Sept. 21, 2018, No. 18-cv-02317) 2019 WL 2615754.)

Thus, even if DOJ were correct that the Challenged Regulations have effect only during the registration process, Appellants' claims would not be moot. For countless registration applications have yet to be processed, and many more may be forthcoming.

2. Alternatively, at Least Some of the Challenged Regulations Present Ongoing Controversies Requiring Resolution of Appellants' Claims

At minimum, this appeal involves challenges to several

regulations whose application necessarily extends well beyond the end of the statutory registration period. Because these regulations present live and ongoing controversies that resolution by this Court can remedy, this appeal is not moot, at least as to those provisions.

a. Requirement that "bullet-button shotguns" be registered (Cal. Code Regs., tit. 11, § 5470, subd. (d))

First, Appellants contend that, by requiring registration of "bullet-button shotguns," California Code of Regulations, title 11, section 5470, subdivision (d) unlawfully alters (and, in fact, directly conflicts with) the express language of section 30515 and the legislative history of AB 1135 and SB 880. (A.O.B. at pp. 39-41.) Should Appellants prevail on their claim that DOJ cannot unilaterally require the registration of "bullet-button shotguns," the rights of "bullet-button shotgun" owners, including some Appellants, will be directly affected, as they would not be limited by the restrictive use, transfer, and transportation restrictions that apply to lawfully acquired firearms later classified and registered as "assault weapons."

DOJ argues in a footnote that it has mooted Appellants' challenge to the inclusion of "bullet-button shotguns" as "assault weapons" by adopting California Code of Regulations, title 11, section 5460 in compliance with the APA's rulemaking procedures. (Resp. Br. at p. 40, fn. 10.) Section 5460 incorporated by reference all the definitions in section 5471, challenged here. (Cal. Code. Regs., tit. 11, § 5460.) The argument makes clear that DOJ misunderstands Appellants' challenge. Appellants do not merely argue that DOJ exceeded its claimed APA exemption when it declared that "bullet-button shotguns" are "assault weapons"—though it did. Instead,

Appellants argue that DOJ could not adopt the "bullet-button shotgun" regulation at all because doing so exceeded DOJ's regulatory authority under the AWCA altogether.

DOJ does not simply define an "assault weapon" term here. Instead, it declares a whole class of firearms to be "assault weapons" even though the Legislature chose not to do so. That is an enlargement of the AWCA's scope that DOJ lacks authority to make. (*Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 974 (*Slocum*) [holding that no agency may adopt and enforce regulations "inconsistent with the governing statute, [that] alter or amend the statute, or enlarge its scope."]; see also *Interins. Exch. of Auto. Club v. Super. Ct.* (*Williams*) (2007) 148 Cal.App.4th 1218, 1236 (*Interins. Exch.*) [holding that "an agency does not have the authority to alter or amend a statute or enlarge or impair its scope"]; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321 ["[N]o regulation is valid or effective unless consistent and not in conflict with the statute."].) The incorporation of section 5471 into section 5460 does not cure that fatal defect just because the DOJ complied with the APA's procedural requirements when it adopted section 5460. Such a defect is incurable.

b. Adoption of new definitions (Cal. Code Regs., tit. 11, § 5471)

Similarly, Appellants argue that, aside from exceeding subdivision (b)'s APA exemption, many definitions in the Challenged Provisions unlawfully *alter* the statutes they purportedly implement. (A.O.B. at pp. 41-42; see also *infra* Part III.B.3.) Again, DOJ can never legally adopt and enforce a regulation that alters a statute, *even if it goes through the formal APA rulemaking process*. (*Slocum*, *supra*,

134 Cal.App.4th at p. 974.) If Appellants are correct that some definitions unlawfully alter existing statute, section 5460's incorporation of identical definitions cannot cure that defect.[1] So the formal adoption of section 5460 does nothing to moot this aspect of the appeal.

Further, to the extent the definitions clarify which firearms are subject to the registration scheme, they will always have some effect beyond the now-closed registration period. Indeed, anytime a person is charged with possessing an unregistered "assault weapon," application of the Challenged Regulations will be necessary to determine whether registration was required in the first place.

Even if that were not the case, the Court should not allow DOJ to make a sham of the APA, as it has done with its adoption of section 5460. DOJ adopted the definitions in section 5471 under the APA exemption of subdivision (b), claiming they would be limited to application for registration only and not for criminal enforcement. (A.O.B. at pp. 22-23.) Of course, it would make no sense to have different definitions for the same terms. DOJ knew all along that it would be using those same definitions to apply to Penal Code section 30515. But it manipulated the APA exemption in subdivision (b) to pass the definitions it wanted without public comment, knowing it would be able to force them on the public later. The APA process DOJ went through when adopting section 5460 was a farce. The conclusion

[1] DOJ adopted section 5460 after Appellants brought this appeal. If Appellants prevail on their claim that provisions of the Challenged Regulations alter existing statutes, and should DOJ continue enforcing those provisions, Appellants intend to seek relief prohibiting enforcement.

was preconceived. For these reasons, even if adoption of section 5460 technically moots Appellants' challenges to section 5471 for unlawfully bypassing the APA, this Court should assert its powers of equity to prevent that from happening.

c. Serialization Requirements (Cal. Code Regs., tit. 11, § 5472, subds. (f),(g))

DOJ argues this particular dispute is moot for two reasons. First, it argues that it is moot because the registration period has closed. (Resp. Br. at p. 47.) Second, it argues that it is moot because the very law that Appellants argue these provisions conflict with has since taken effect. (Resp. Br. at p. 47.) Again, none of Appellants' disputes are moot as a result of the registration period having ended. Specific to this regulation, its effect is ongoing because if law enforcement wanted to confirm the legality of an after-market serial number appearing on a firearm, it would need to look to these regulations to determine whether the person complied with the law.

d. Compelled non-liability clause (Cal. Code Regs., tit. 11, § 5473, subd. (b)(1))

Appellants challenge California Code of Regulations title 11, section 5473, subdivision (b)(1), which purports to relieve DOJ of liability for disclosing information collected under its registration scheme. (A.O.B. at pp. 44-45.) DOJ makes no argument that Appellants' challenge to this particular provision is moot. That is likely because it cannot. This provision is an ongoing, indefinite condition of registration between DOJ and registrants. DOJ could disclose a registrant's information at any time. So Appellants' challenge to the compelled non-liability clause cannot be mooted by the closing of the registration window, even *if* the end of registration

otherwise mooted Appellants' claims, which it does not.

e. Restriction on removing "bullet buttons" (Cal. Code Regs., tit. 11, § 5477)

Finally, Appellants challenge California Code of Regulations, title 11, section 5477, which prohibits owners of "bullet-button firearms" from restoring the original magazine releases to their firearms *after* they have registered them as "assault weapons." (A.O.B. at pp. 47-48, citing Code Regs., tit. 11, § 5477.) This particular regulation, by its terms, applies not to just the brief registration period, but indefinitely. Indeed, it restricts owners from removing "bullet buttons" from their registered firearms now—or *anytime* in the future. Thus, Appellants' claim that the restriction on "bullet button" removal is an illegal regulation could not be mooted just because the registration period closed.

In sum, Appellants' claims are not moot. The Challenged Regulations raise ongoing controversies that continue to exist beyond the close of the registration period.

B. Even if Appellants' Claims Are Moot, the Court Should Exercise Its Authority to Review this Case Under the Exceptions to the Mootness Doctrine

Even if this appeal did not involve ongoing controversies, appellate review would still be appropriate. California courts may review cases that would otherwise be moot if: (1) the case presents an issue of broad public interest that is likely to recur; (2) there may be a recurrence of the issues between the parties; or (3) a material question remains for the Court's determination. (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1548 (*Santa Monica Baykeeper*); see also Resp. Br. at p. 25.) Each of these

circumstances is present here.

First, DOJ's circumvention of the APA raises an issue of public concern broader than the issues Appellants raise here. Indeed, the fact that DOJ has repeatedly flouted the APA in the past signals that this pattern of regulatory malfeasance will continue. For example, in 2014, the DOJ implemented a package of illegal underground regulations concerning California's Firearm Safety Certificate Program and long-gun safe-handling demonstrations. (Pls' Non-Oppn. to Defs.' Demurrer at p. 2, *Belemjian v. Harris* (Fresno Cnty. Super. Ct., Apr. 2, 2015) No. 1-CE-CG-00029 [attached to Appellants' Request for Judicial Notice as Exhibit B].) This resulted in the filing of a formal OAL complaint. (*Ibid.*) But DOJ enforced the underground rules anyway. (*Ibid.*) This conduct prompted Appellant CRPA and other individuals to sue. (*Ibid.*) DOJ subsequently adopted the *very same rules* as "emergency regulations" under the APA—even though the "emergency" was of its own making. (*Ibid.*) This is but one example of a long history of APA abuses by DOJ.

This Court would be well within its bounds to consider DOJ's APA abuses here. Courts have repeatedly exercised their discretion to resolve issues found to be of continuing public interest. (*Burch v. George* (1994) 7 Cal.4th 246 [court retained jurisdiction to consider important issues about community property and ERISA rights even though the husband had died and the parties had settled]; see also *Liberty Mut. Ins. Co. v. Fales* (1973) 8 Cal.3d 712; *Abbott Ford, Inc. v. Super. Ct.* (*Ford Motor Co.*) (1987) 43 Cal.3d 858.) Whether DOJ must abide the formal rulemaking procedures of the APA is a continuing issue of broad public concern, even if Appellants' claims are moot.

What's more, courts have recognized that resolving important public issues is "particularly appropriate when it is likely to affect the future rights of the parties before us. [Citations.]" (*Daly v. Super. Ct.* (*Duncan*) (1977) 19 Cal.3d 132, 141, italics added.) Such is the case here. In California, DOJ is the agency charged with adopting and implementing firearm-related regulations. Appellant CRPA represents tens of thousands of firearm owners throughout the state. (J.A. IV 1482.) These members, and countless others similarly situated, will continue to be affected by the actions of an agency that has a track record of skirting the APA. And, with an ever-increasing number of firearm-related statutes that DOJ must enforce, the problem only worsens. In sum, DOJ's abuse of the APA raises issues of broad public concern that are likely to recur, warranting review even if the Court holds that Appellants' specific claims are moot.

Consideration of Appellant's claims is also appropriate because the specific controversies between the parties are likely to recur. (*Santa Monica Baykeeper*, *supra*, 193 Cal.App.4th at p. 1548.) In fact, it is a virtual certainty. This is true for both the validity of the Challenged Regulations and of the identical definitions adopted by reference in section 5460. As to the Challenged Regulations, DOJ still must make determinations on a (potentially growing) number of pending registration applications under the Challenged Regulations. These determinations (particularly if they are denied) will likely result in further litigation of issues raised here.

Finally, as explained above, several material questions remain given that the Challenged Regulations continue to raise controversies beyond the close of the registration period. (See *supra* Part I.A.2.) For

these reasons, the Court should reject DOJ's mootness arguments and rule on Appellants' claims.

II. THE TRIAL COURT WRONGLY SUSTAINED DOJ'S DEMURRER

A. Appellants Did Not Waive Their Right to Appeal the Trial Court's Demurrer Ruling

DOJ argues that, by filing their amended pleading, Appellants waived any appeal of the trial court's sustaining DOJ's demurrer. DOJ is wrong. When appealing a ruling sustaining a demurrer, "it is only where the plaintiff *amends the cause of action* to which the demurrer was sustained that any error is waived." (*County of Santa Clara v. Atl. Ritchfield Co.* (2006) 137 Cal.App.4th 292, 312 ("*Atl. Richfield Co.*"), citing Code Civ. Proc., § 472c, subd. (b), italics added.) As DOJ itself points out, "[i]f a plaintiff chooses not to amend one cause of action but files an amended complaint containing the remaining causes of action or amended versions of the remaining causes of action, no waiver occurs and the plaintiff may challenge the intermediate ruling on the demurrer on an appeal from a subsequent judgment." (Resp. Br. at pp. 26-27, quoting *Atl. Richfield Co.*, *supra*, 137 Cal.App.4th at p. 312.)

As DOJ itself also points out: "Appellants filed an amended pleading, reasserting eight of the initial complaint's nine causes of action for declaratory and injunctive relief as causes of action for a writ of mandate" but "Appellants also reasserted *those same eight causes of action for declaratory and injunctive relief in their amended pleading*." (Resp. Br. at p. 27, italics added.) In other words, according to DOJ's own description of Appellants' amended pleading, Appellants simply *added* identical writ of mandate claims that mirrored their

existing claims for declaratory and injunctive relief. They never withdrew their declaratory relief claims. Nor did Appellants alter the grounds on which they sought relief. Appellants have thus not waived their right to appeal the lower court's order sustaining the demurrer as to any causes of action.

Even if one might argue that Appellants amended their causes of action, the Court should still allow Appellants to appeal the ruling on the demurrer. As DOJ acknowledges, amending a pleading following a sustained demurrer only "*ordinarily* waive[s]" errors by the trial court in sustaining the demurrer. (Resp. Br. at p. 26, citing *Atl. Richfield Co.*, *supra*, 137 Cal.App.4th at p. 312.) There are good public policy reasons not to waive them here.

First, punishing Appellants for trying to resolve matters in the trial court runs contrary to the public interest of preserving judicial resources. While Appellants believed that they properly presented their initial claims as declaratory relief actions under Government Code section 11350, Appellants still followed the trial court's instruction that they bring their challenge in the form of a writ of mandate to move the case along to the merits stage. Bothering appellate courts with such a purely procedural question would not be a good use of judicial resources. (See *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1179-80 [explaining that the purpose of amending California Rules of Court rule 13 was "to encourage appellants not to file appeals prematurely and to conserve judicial resources"].) Yet, that is exactly what would be encouraged by barring Appellants from raising that procedural issue now.

Second, the specific question at issue, the scope of Government

Code section 11350, is an important one. Trial courts may rely on this court's inaction on this question of law to reject proper declaratory relief claims challenging regulations if brought under Government Code section 11350 that they should not be. That should be clarified now.

B. The Challenged Regulations Are Subject to a Declaratory Relief Action

1. Appellants Challenge the Validity of Regulations, Not an Administrative Decision

DOJ first seeks to shield the Challenged Regulations from a declaratory relief action by labeling its decision to circumvent the APA when adopting them as an "administrative decision." (Resp. Br. at pp. 28-31.) While it is correct that an "administrative decision" can be challenged only in a writ preceding (Resp. Br. at p. 28), DOJ provides no authority for its conclusion that what Appellants challenge here is one. DOJ cites examples of administrative decisions that courts have held must be challenged in a writ proceeding.[2] Yet, tellingly, not one of those cases involves the validity of a regulation. This is so despite Appellants previously inviting DOJ to cite such a case; suggesting that no such case exists. (A.O.B. at p. 28 & fn. 9.) For good reason. The initial step in adopting *any* regulation is to interpret the underlying statute as conferring the authority on the agency to do

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[2] (See Resp. Br. at pp. 28-29, citing *State of California v. Super. Ct.* (*Veta Co.*) (1974) 12 Cal.3d 237 [challenging California Coastal Commission permit denial], *City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461 [challenging State Department of Finance refusal to disperse funds from a dissolved public redevelopment program to an interested City], and *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].)

so. Accepting DOJ's interpretation that this necessary step is an administrative decision that can only be challenged in a writ proceeding would nullify Government Code section 11350.

Second, certain administrative decisions can be subject to declaratory relief actions when they effect "an overarching, quasi-legislative policy set by an administrative agency," not merely a "discretionary, specific agency decision[]." (*Californians for Native Salmon & Steelhead Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1429, citing *Bess v. Park* (1955) 123 Cal.App.2d 49, 52-54 (*Bess*).) DOJ claims there is no ongoing policy with the regulations because their effect is over. As explained above, however, for the same reasons this matter is not moot, it is an ongoing policy. Some examples reveal why. DOJ continues to enforce its regulations that treat "bullet-button shotguns" no differently than "assault weapons." (Cal. Code Regs., tit. 11, §§ 5460, subds. (a), (pp), 5470, subd. (d).) That has the ongoing effect that such shotguns will continuously be subjected to the AWCA restrictions. (See *supra* Part I.A.2.a.) DOJ also continues to enforce the restriction on removing a "bullet button" from already registered "assault weapons." (Cal. Code Regs., tit. 11, § 5477.) And, as explained above in Part I.B above, DOJ has a history of skirting the APA to suit its needs. Thus, even if the Court construes Appellants' challenge as being to an administrative decision, declaratory relief is still appropriate.

2. Government Code Section 11350 Applies to the Challenged Regulations, As Does Code of Civil Procedure Sections 526 and 1060

DOJ argues that Government Code section 11350 applies *only* to challenges to regulations adopted in compliance with the APA.

(Resp. Br. at pp. 29-30.) But it provides no authority for that position. That is because the statute is clearly not so limited. Under section 11350, 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*, *supra*, 132 Cal.App.2d at p. 53, italics added.) "Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, citing *In re Rojas* (1979) 23 Cal.3d 152, 155.) "To determine the common meaning, a court typically looks to dictionaries." (*Consumer Advocacy Grp., Inc. v. Exxon Mobil Corp*. (2002) 104 Cal.App.4th 438, 444, citing *People ex rel. Lungren v. Super. Ct.* (*Am. Std., Inc.*) (1996) 14 Cal. 4th 294, 302.) "Any" is ordinarily defined as "one, some, every, or all without specification." (American Heritage Dict. (4th ed. 2006) p. 81.) Thus, section 11350 applies to a challenge of every sort of regulation.

It is true, however, as DOJ points out, that the California Supreme Court has mentioned in passing that "[s]ection 11350 has no application" to regulations that *are* undeniably exempt from the APA. (Resp. Br. at p. 31, citing *Pac. Legal Found. v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 169 fn. 4.) But at least one appellate court has held that it does apply to challenges, like the ones here, over *whether* regulations are exempt from the APA. (See *Morales v. Cal. Dept. of Corr. & Rehab.* (2008) 168 Cal.App.4th 729 [court evaluated a declaratory relief action under section 11350 in determining whether

administrative rules qualified for an APA exemption, holding they did not]; see also *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214 [declaratory relief under section 11350 appropriate to challenge alleged "underground regulation."].) As in *Morales*, Appellants are challenging an agency's assertion that its regulations are exempt from the APA. Thus, while a court could deny declaratory relief by finding a regulation qualifies for an APA exemption, it could not, as the trial court did, reject such claims on the grounds that declaratory relief is the improper procedural vehicle for evaluating such claims.

In any event, both the trial court and DOJ overlook the fact that Appellants' amended complaint seeks declaratory relief not only under Government Code section 11350, but also under Code of Civil Procedure sections 526 and 1060. (J.A. IV 1476-1529.) DOJ's arguments for why section 11350 does not apply here makes no sense to the declaratory relief Appellants seek under those provisions. Recall that Appellants challenge DOJ's regulations not only because DOJ adopted them without adhering to the APA, but also because they unlawfully alter existing statutes. (A.O.B. at pp. 38-48.) So even if this Court accepts that Appellants' claims against the Challenged Regulations for not adhering to the APA were challenges to DOJ's administrative decisions, or that section 11350 does not apply to regulations adopted under an APA exemption, those holdings would be irrelevant to Appellants' additional claims that the Challenged Regulations unlawfully alter existing statutes. "Where, as here, 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, 1303 (*PaintCare*), citing Govt. Code, § 11342.2.)

III. THE CHALLENGED REGULATIONS ARE INVALID

A. DOJ Is Not Entitled to Deference on Whether the Challenged Regulations Qualify for Subdivision (b)'s APA Exemption

Like the trial court, DOJ conflates the standard for judicial review of regulatory action, generally, with the standard for reviewing an agency's interpretation that its action is exempt from the APA, specifically. DOJ is correct that agencies generally enjoy some leeway to "fill up the details" of a statutory scheme with regulations based on the agency's construction of the relevant authorizing statute. (Resp. Br. at p. 36, citing *PaintCare*, *supra*, 233 Cal.App.4th at pp. 1298-1299, 1307-1308.) But, like the trial court, DOJ cites zero authority for the proposition that agencies have that same sort of leeway in adopting regulations when bypassing the APA as they have when complying with it; despite being invited to do so by Appellants. (A.O.B. at p. 34, fn. 10.) That is because the case law is unequivocal that no such deference is due when there is a question about whether the agency needed to comply with APA procedures in the first place. If there is any doubt over the APA's application, courts must give deference *not* to the agency's claim of exemption, but to application of the APA procedures. (*Cal. Sch. Bds. Assn. v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1328 (*Cal. School Bds. Assn.*) [holding that "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA"].) DOJ effectively asks this Court to

reject that well-settled rule. But it has given no reason for doing so.

What's more, and perhaps dispositive here, DOJ ignores Appellants' argument that Penal Code section 30520, subdivision (c), precludes DOJ's reading of subdivision (b). (A.O.B. at pp. 23, 37.) As a reminder, that provision confers on DOJ the authority "to adopt those rules and regulations that may be necessary or proper to carry out the purposes and intent of [the AWCA]." (Pen. Code, § 30520, subd. (c).) It predates the adoption of SB 880 and AB 1135, and neither bill altered it. Because its grant of regulatory authority contains no APA exemption, DOJ must generally adhere to the APA when promulgating regulations implementing the AWCA. So subdivision (b) cannot apply to just any regulation furthering the broader purposes of the AWCA, as DOJ suggests and as the trial court held. (Resp. Br. at pp. 32-37; J.A. V 1933-1944.) Subdivision (b) must be (*and expressly is*) limited to implementing the registration process for "bullet-button assault weapons." (Pen. Code, § 30900, subd. (b)(5).) Interpreting it otherwise would nullify section 30520, subdivision (c). There is no indication that the Legislature intended such a result. DOJ does not argue otherwise. And there is no canon of statutory construction that would support this argument. To the contrary, as DOJ itself points out, in interpreting statutes, courts should "giv[e] significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. [Citation.]" (Resp. Br. at p. 40, citing *Sierra Club v. Super. Ct.* (*County of Orange*) (2013) 57 Cal.4th 157, 166.) No language in a law should be ignored or needlessly be given interpretation that causes it to duplicate another provision or to have no consequence. (A. Scalia & B. Garner, Reading Law: The

Interpretation of Legal Texts (2012), note 5, p. 174). Courts will avoid reading statutes that render some words altogether redundant. (See *United States v. Menasche* (1955) 348 U.S. 528, 538-539). DOJ is therefore not entitled to any deference on its interpretation of Subdivision (b)'s APA exemption.

B. The Challenged Regulations Are Invalid Both Because They Failed to Comply with the APA and They Unlawfully Alter Statutes

The trial court did not review any of the Challenged Regulations on an individual basis. DOJ does provide arguments for why it contends each of the Challenged Regulations is valid. Each of those arguments, however, fails.

1. Repeal of Lawfully Enacted Definitions for Different Statute (Cal. Code Regs., tit. 11, § 5469)

DOJ's sole argument that it did not repeal regulations defining terms for a separate statute than subdivision (b) is that it merely "moved" them to another newly created regulation and that that new regulation has since been imported into a third, newer regulation (i.e, section 5460), which was adopted in compliance with the APA. (Resp. Br. at pp. 37-38.) But DOJ does not dispute that the regulation to which it originally "moved" these definitions implemented a different statute from which those regulations previously applied. (Resp. Br. at pp. 37-38.) In doing so, DOJ admits that it repealed, without adhering to the APA, the definitions as they had originally been adopted for application to section 30515. DOJ had no authority to do so.

That DOJ subsequently adopted a new regulation that did adhere to the APA, incorporating those definitions by reference, does not cure the original defect of improperly repealing them in the first

place. As explained in Part I.A.2.b above, DOJ's adoption of section 5460 is a sham of the APA process that the Court should not tolerate. Certainly, the Court should allow DOJ to use it as a shield to protect its admittedly unlawful act.

2. Requirement that "Bullet-button Shotguns" Be Registered (Cal. Code Regs., tit. 11, § 5470, subd. (d))

California Code of Regulations title 11, section 5470(d) declares "bullet-button shotguns" to be among the firearms that must be registered under Penal Code section 30900.[3] For DOJ to prevail on its argument that this particular regulation is valid, either: (1) "bullet-button shotguns" must be in the most recent definition of "assault weapon;" or (2) in adopting section 30900, the Legislature had to have intended to afford DOJ the authority to determine what "weapons" other than "assault weapons" needed to be registered—and to do so without adhering to the APA. DOJ claims that both are the case. The rules of statutory construction, however, preclude either position.

a. "Bullet-button shotguns" are not "assault weapons"

Despite previously conceding in two separate briefs in the trial court that "bullet-button shotguns" do not meet the definition of an "assault weapon" (J.A. I 26 ["This is so even though bullet-button shotguns are not statutorily defined as assault weapons"]; J.A. III 1169 ["It does not matter that bullet-button shotguns are not defined as assault weapons by statute"]), DOJ later did an about face, adopting the argument it now presents to this Court that such

[3] Note that two other provisions in the Challenged Regulations have the same effect and must also be enjoined to provide Appellants sufficient relief. (Cal. Code Regs., tit. 11, § 5460, subds. (a),(pp).)

firearms are "assault weapons." (Resp. Br. at pp. 40-43.) DOJ was right the first two times.

As DOJ correctly points out, a semiautomatic shotgun qualifies as an "assault weapon" when it "has the ability to accept a detachable magazine." (Resp. Br. at p. 40, citing Pen. Code, § 30515, subd. (a)(7).) Similarly, before SB 880 and AB 1135 taking effect, semiautomatic rifles and pistols having certain characteristics qualified as "assault weapons" if they also had "the capacity to accept a detachable magazine." (See J.A. I 40.) What 880 and AB 1135 did was replace the previous condition that such a rifle or pistol have "the capacity to accept a detachable magazine" to qualify as an "assault weapon" with the current condition that any such rifle or pistol qualifies as 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 A.O.B. at p. 7.) But the Legislature never made that change to the "assault weapon" definition for shotguns. (Pen. Code, § 30515, subd. (a)(7).)

DOJ does not dispute that the text of the definition for an "assault weapon" as applied to certain shotguns has remained unchanged in the Penal Code since 2000, even with the enactment of SB 880 and AB 1135. In fact, it expressly admits it. (Resp. Br. at p. 42.) Nor does it dispute that such shotguns were never before considered "assault weapons." Instead, it argues that because the Legislature did not define "ability to accept a detachable magazine," DOJ was not only authorized to clarify that term, but to do so without adhering to the APA. (Resp. Br. at pp. 40-42.)

To accept DOJ's view would require flouting well established canons of statutory construction. DOJ's view requires construing two different terms appearing in the same statute as having identical effects: "the capacity to accept a detachable magazine" and "does not have a fixed magazine." Such a result is problematic generally. But in this situation it is particularly so because DOJ's interpretation would also render the definitional changes that SB 880 and AB 1135 expressly made to rifle and handgun "assault weapons" meaningless. For if the previous "detachable magazine" language—which is what is still used for semi-automatic shotgun "assault weapons"—already achieved the purpose of qualifying those firearms as "assault weapons," as DOJ argues, that would mean the SB 880 and AB 1135 definitional amendments were superfluous. "As a general rule, when a legislature 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion.' " (*Gaines v. Fid. Nat. Title Ins. Co.* (2016) 62 Cal.4th 1081, 1113, citing *Russello v. United States* (1983) 464 U.S. 16, 23.) Thus, contrary to the DOJ's argument, the presumption is that the Legislature intended to leave "bullet-button shotguns" out of the new definition of "assault weapon" when it changed the definitions for rifles and handguns and left shotguns alone.

DOJ not only ignores these canons of statutory construction contradicting its view of the law, but also the legislative history. It only points to the trial court's finding that including "bullet-button shotguns" in the "assault weapon" definition furthers the general purpose of the Legislature's amendment to the AWCA through SB 880

and AB 1135. (Resp. Br. at p. 43.) But, the legislative history, before the trial court, shows that a Senate Third Reading *and* an Assembly Public Safety Committee report on SB 880 stated that bill: "Revises the definition of 'assault weapon' to mean 'a semiautomatic centerfire ***rifle***, or a semiautomatic ***pistol*** that does not have a fixed magazine but has any one of those specified attributes." (J.A. I 39, 43, italics added.) Both documents also describe existing law as relates to "assault weapon" shotguns but never mentions that definition being altered. (J.A. I 39, 43.) In fact, Appellants are unaware of, and DOJ cites no other mention of, the word "shotgun" appearing in any portion of the legislative history beyond describing existing law.

Even so, DOJ argues that if the text of the AWCA is unclear to settle whether "bullet-button shotguns" are part of the new definition of "assault weapon," the Court should consider public policy and decide the issue in favor of DOJ's view. (Resp. Br. at p. 43.) DOJ cites no authority that public policy concerns may trump the canons of statutory construction that show that DOJ's interpretation of the text is simply wrong. What's more, because DOJ's interpretation means that people in possession of "bullet-button shotguns" who did not register them are now subject to criminal prosecution for the unlawful possession of an "assault weapon," the Rule of Lenity requires that courts decide any ambiguity in favor of non-criminality. (See *United States v. Santos* (2008) 553 U.S. 507, 514 ["The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."].)

Moreover, and perhaps most damning to DOJ's view, the provision DOJ relies on to argue that "bullet-button shotguns" are

"assault weapons" expressly refers to "assault weapons" that are "defined in Section 30515." (Pen. Code, § 30900, subd. (b)(1).) Section 30900 is not a definitional statute. It does not purport to define anything, let alone add to the referenced section 30515's definition. The notion that the Legislature opted to leave a definition unchanged in a definitional statute, while amending two other essentially identical definitions in the same statute but intended to afford DOJ authority to declare the unchanged definition as having the same effect as the amended ones in a vague phrasing appearing in a separate, non-definition statute strains credulity.

In sum, "bullet-button shotguns" were not "assault weapons" before the Legislature adopted 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 has no authority to graph SB 880 and AB 1135's amendment made to certain rifle and handgun "assault weapons" onto "bullet-button shotguns." That is a decision for the Legislature—one it did not make when presented with the opportunity.

b. DOJ lacks authority to require that firearms not meeting the new "assault weapon" definition be registered under section 30900

Trying to cover all of its bases, DOJ insists that even if "bullet-button shotguns" are not "assault weapons" under the new definition, DOJ still had authority to require that they be registered under section 30900. (Resp. Br. at p. 39.) Section 30900, subdivision (b)(1) provides:

> Any person who . . . lawfully possessed an ***assault weapon*** that does not have a fixed magazine, as defined in [s]ection 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.

(Pen. Code, § 30900, subd. (b)(2), double emphasis added.)

DOJ reads the language "including those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool" as authorizing DOJ to require the registration of *any* "weapons with a bullet button," even if not "assault weapons." (Resp. Br. at p. 39.) Not only is DOJ's reading contrary to the plain language of the statute, as well as legislative intent and context, but it would lead to absurd results.

Section 30900, subdivision (b)(1) expressly references "assault weapons" that are "defined in Section 30515." (Pen. Code, § 30900, subd. (b)(1).) In doing so, the Legislature limited its application to "assault weapons" as defined in that other statute. It was not inviting DOJ to construe subdivision (b)(1) as applying to other non-"assault weapon" firearms. DOJ's reading erroneously construes the word "including" to mean "in addition to" those expressly identified weapons. (Resp. Br. at pp. 39-40.) But "including" in this context modifies the phrase "***assault weapon*** that does not have a fixed magazine." (Pen. Code, § 30900, subd. (b)(2).) In other words, it is merely *clarifying* what weapons qualify as "assault weapons" in that section, given the new "assault weapon" definitions created by SB 880 and AB 1135. It is not adding weapons beyond those definitions.

Thus, to fall under section 30900's control, a firearm must first be an "*assault* weapon," not simply a "weapon," as DOJ asserts. There is no dispute that a shotgun is a "weapon" as that term is defined under California law. All firearms are "weapons." (See Pen. Code, §

16520 [defining "firearm" to mean "a device, designed to be used as a weapon . . . ."].) But DOJ's interpretation of section 30900 would mean that virtually any firearm with a magazine, including most handguns and bolt-actions rifles, would have to be registered. For those firearms are also "weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool." (Pen. Code, § 30900, subd. (b)(2).) How DOJ can limit its construction to shotguns with "bullet buttons" and not other non-assault weapons when the term "bullet button" is not mentioned simply does not make sense.

Legislative history and statutory context confirm that section 30900 governs only "assault weapons." AB 1135 and SB 880, the bills that created section 30900, subdivision (b)(1), were both titled "Firearms: assault weapons." (Sen. Bill No. 880 (2015-2016 Reg. Sess.); Assem. Bill No. 1135 (2015-2016 Reg. Sess.).) Those bills also amended section 30515 and created section 30680. (Sen. Bill No. 880 (2015-2016 Reg. Sess.) §§ 1-2; Assem. Bill No. 1135 (2015-2016 Reg. Sess.) §§ 1-2.) Section 30515 exclusively concerns definitions for "*assault* weapons." The provisions of section 30680 apply exclusively to "*assault* weapons." Section 30900, which contains subdivision (b), is part of Article 5, titled "Registration of Assault Weapon*s* and .50 BMG Rifles and Related Rules." And all three statutes appear in Chapter 2, titled "*Assault Weapons* and .50 BMG Rifles." 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]

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[4] The reference to the date "January 1, 2018," is no longer

(Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 880 (2015-2016 Reg. Sess.) as amended, May 17, 2016, p. 1.)

Considering all the express references to "assault weapon" in these provisions, the notion that section 30900, subdivision (b)(1), somehow extends to firearms which are not "assault weapons" is dubious at best. DOJ cites zero support in the legislative history for its position that section 30900 granted it the authority to declare that non-"assault weapons" had to be registered. Nor does it explain why a statutory scheme directed exclusively at "assault weapons" would implicitly contemplate non-"assault weapons." Also telling is that no other previous registration under the AWCA has required non-"assault weapons" to be registered.

Finally, and perhaps most telling is that if not "assault weapons," then there is no statute anywhere in the California Code prohibiting their continued sale, transfer, and acquisition. DOJ's view of section 30900, subdivision (b)(1), would thus mean that the Legislature intended to require registration of "bullet-button shotguns" by July 1, 2018, but still allow people to acquire such shotguns on July 2, 2018—and every day thereafter—*without registering them*, as registration would be closed. (*Ibid.*) The rules of statutory construction foreclose such an absurd result. (See *Barnes v. Chamberlain* (1983) 147 Cal.App.3d 762, 766 [holding that "a construction that would create a wholly unreasonable effect or an

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applicable as a result of Assembly Bill 103 extending the registration deadline to July 1, 2018.

absurd result should not be given"], citing *Dempsey v. Market Street Ry. Co.* (1943) 23 Cal.2d 110, 113.)

DOJ's unilateral decision to require registration of "bullet-button shotguns," even if they are not "assault weapons," is thus an enlargement of the scope of section 30900, subdivision (b)(1), that DOJ lacks authority to make. Even if an exemption to the APA applies, "an agency does not have the authority to alter or amend a statute or enlarge or impair its scope." (*Interins. Exch.*, *supra*, 148 Cal.App.4th at p. 1236.)

3. Adoption of New Definitions (Cal. Code Regs., tit. 11, § 5471)

In defending its adoption of various "assault weapons" definitions, DOJ points to its general authority to define statutory terms under the AWCA. (Resp. Br. at pp. 44.) But Appellants do not dispute DOJ's general authority to define such terms. They dispute DOJ's authority to adopt them without adhering to the APA, as it has always done in defining past "assault weapon" terms (J.A. II 585), and as DOJ concedes it needed to do in recently adopting a regulation importing those identical definitions for purposes of applying to section 30515. (See Cal. Code Regs., tit. 11, § 5460.) While DOJ argues that provision moots this particular challenge, it is wrong for the reasons explained in Part I.A.2.b above.

Appellants also dispute specific definitions DOJ has adopted for certain terms because they alter statutes, something DOJ *never* has authority to do; regardless of whether it complies with the procedural requirements of the APA. (*Slocum*, *supra*, 134 Cal.App.4th at p. 974.) For example, the provisions defining "[a]bility to accept a detachable magazine" and "[t]hose weapons with an ammunition feeding device

that can be readily removed from the firearm with the use of a tool," clarify that "bullet button shotguns" lack a "fixed magazine." (Cal. Code Regs., tit. 11, § 5460, subds. (a),(pp).) These provisions effectively declare a "bullet button shotgun" to be an "assault weapon" that must be registered, which, as explained above in Part II.B.2, the legislature did not intend. Also problematic are the provisions explaining how "length" of firearms are to be determined. (Cal. Code Regs., tit. 11, § 5460, subds. (d),(x).) These provisions could have an impact on whether a particular firearm is lawful in ways the legislature did not intend. (See Pen. Code, §§ 17170-17180 [defining the highly restricted "short barreled rifle" and "short-barreled shotgun."].) There are other problematic definitions, including for "flash suppressor," which includes items the legislature did not clearly mean to include in that definition. (Cal. Code Regs., tit. 11, § 5460, subd. (r).) Because these regulations would be invalid even if DOJ had adopted them in compliance with APA processes, DOJ's mootness argument certainly does not affect at least these challenges.

4. Serialization Requirements (Cal. Code Regs., tit. 11, § 5472, subds. (f), (g))

These regulations advanced by six months Penal Code section 29180, subdivision (c)'s deadline for the requirement that owners of firearms lacking a serial number to serialize them. DOJ raises two arguments in defense of these provisions to Appellants' challenge: (1) that the dispute is now moot; and (2) they are necessary for the "assault weapon" registration process. (Resp. Br. at pp. 47-48.) DOJ is wrong on both scores.[5]

[5] DOJ also argues in a footnote that Appellants lack standing to

As an initial matter, contrary to DOJ's contention, the serialization requirements have nothing to do with the registration *process*. (Resp. Br. at p. 47.) Instead, they relate *only* to *what* firearms can be registered. DOJ simply lacked the authority to make that decision under subdivision (b)'s APA exemption. Again, that exemption was limited to *how* firearms were to be registered, not which ones could not be.

What's more, whether these regulations are "necessary" for the "assault weapon" registration process is irrelevant as to Appellants' claim that those provisions unlawfully expand statutory law. Appellants claim that DOJ altered the scope of statutory law by advancing 29180, subdivision (c)'s deadline for serializing firearms. (A.O.B. at pp. 43.) Relying on *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 182-183 (*Ralphs*), DOJ argues that its authority to promulgate regulations here is not limited by authority given in other statutes. (Resp. Br. at pp. 48-49.) But, in *Ralphs*, the plaintiffs looked to statutes governing milk and wine to support their argument that a statute must expressly authorize quantity discounts on beer for such discounts to come within the rule-making authority delegated in that case. (*Ralphs*, *supra*, 69 Cal.2d at pp. 182-183.) In short, the plaintiffs relied on statutes governing entirely different products. (*Ibid.*) Here,

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challenge this particular regulation because none of them have alleged to possess such a weapon. (Resp. Br. at p. 48, fn 17.) But, as Appellants allege, they bring this challenge because DOJ deprived them of their statutory rights under the APA to weigh in on the creation of these regulations. (J.A. IV 1479-1482.) It is not required that they be uniquely affected by a regulation to vindicate their rights under the APA. DOJ cites no authority to the contrary. In any event, Appellant CRPA brings this action on behalf of its thousands of members who *are* uniquely affected by each of the Challenged Regulations. (J.A. IV 1478-1482.)

the statutes govern the exact same thing: un-serialized firearms. That these regulations affect only a subset of such firearms makes no difference. For that subset is still contemplated by section 29180, subdivision (c).

In any event, public policy should preclude DOJ from unilaterally advancing statutory deadlines simply because it did so on a schedule that allowed it to avoid accountability. Otherwise, agencies in this state would have an incentive to do likewise.

5. Compelled Non-liability Clause (Cal. Code Regs., tit. 11, § 5473, subd. (b)(1))

This provision purports to exempt DOJ from certain liability in the case it inadvertently discloses registrants' personal information. An agency simply has no authority to exempt itself from any liability, at least without express authority from the legislature to do so. And DOJ points to no such authority. Instead, DOJ hangs its hat on the qualifier it added to section 5473, subdivision (b)(1) that it applies "[e]xcept as may be required by law." (Resp. Br. at p. 49.) But that is not enough. This regulation either exceeds DOJ's authority or it does nothing, in which case it cannot be considered "necessary" as DOJ contends.

6. Excessive Registration Information Requirement (Cal. Code Regs., tit. 11, § 5474, subd. (a))

These regulations added requirements that registrants provide: (1) proof of lawful status in the country beyond what is expressly called for in statute; and (2) digital photographs of the firearm sought to be registered. (Cal. Code Regs., tit. 11, § 5474, subd. (a).) DOJ lacks the authority to adopt these requirements and they are void. Again,

subdivision (b)'s APA exemption is limited to implementing the registration process, that is, *how* firearms are to be registered. These regulations go beyond that by adding extra-statutory requirements just to qualify for registration.

DOJ again conflates its general rulemaking authority with the more limited authority agencies enjoy when adopting regulations via an APA exemption. (Compare *Assn. of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 391, with *Cal. Sch. Bds. Assn.*, *supra*, 186 Cal.App.4th at p. 1328.) DOJ argues that its requirements to show additional residency documentation and photographs of the firearms are just part of the process. But that is too expansive a view of what the "registration process" includes with respect to subdivision (b)'s APA exemption.

The AWCA includes a comprehensive list of information applicants must provide to register their firearms as "assault weapons." (See, e.g., Pen. Code § 30900(b)(3) [requiring applicants to submit a description of the firearm, information regarding where the firearm was acquired, as well as their full name, address, telephone number, date of birth, sex, height, weight, eye color, hair color, and California driver's license or identification card number].) This suggests that is all the documentation is required. Had the legislature intended to allow DOJ to add requirements, it would have been clearer than subdivision (b). Tellingly, DOJ relies exclusively on laws other than subdivision (b) to justify its regulation requiring additional documentation of lawful status in the country. (Resp. Br. at p. 49, citing, e.g., Pen. Code, § 30950.)

Similarly, the AWCA says nothing about registrants having to

have access to digital photography equipment to be able to qualify for registration. DOJ unilaterally added that requirement. The requirement is a step too far. That DOJ does not have this requirement for other forms of registration shows it is not necessary here either. To illustrate, an appropriate regulation under subdivision (b) would be to explain the format and process for uploading photos, had the Legislature chosen to make that requirement. Adding a photograph requirement when the Legislature made no mention of such a requirement, however, is not.[6]

7. Joint-registration Restrictions (Cal. Code Regs., tit. 11, § 5474.1, subd. (b))

This regulation defines the statutory term "family member" for purposes of joint registration by people qualifying under that term. Doing so is beyond the scope of DOJ's authority. Again, Subdivision (b)'s APA exemption is limited to implementing the registration process, i.e., *how* firearms are to be registered. This regulation limits *who* can even engage in that process.

In defending this action, DOJ *again* conflates its general rulemaking authority with the more limited authority agencies enjoy when adopting regulations under an APA exemption. (Compare *Assn. of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 391, with *Cal. Sch. Bds. Assn.*, *supra*, 186 Cal.App.4th at p. 1328.) DOJ points to other agencies that have through regulation defined the term "family

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[6] DOJ argues that Appellants have not addressed the digital photograph requirement for de-registering a weapon and have thus waived their challenge to it. (Resp. Br. at p. 51, fn. 18.) But the identical argument for why the photograph requirement for registering is unlawful applies to that regulation, even more so, being that it takes place *after* the registration process.

member" appearing in various other statutes. (Resp. Br. at p. 51, fn. 21.) But nowhere does DOJ indicate whether any of those definitions were adopted in compliance with the APA. If they were not, they are irrelevant to the question of whether DOJ exceeded its authority under subdivision (b) by adopting this definition without adhering to the APA.

Curiously, DOJ dismisses as irrelevant Appellants point that DOJ previously refused to adopt an almost identical regulation, merely because it was for a prior registration cycle. (Resp. Br. at p. 51, fn. 20.) But DOJ does not explain what has changed since then that would make a difference. What's more, if DOJ did not have the authority to make this regulation under section 30520, subdivision (c), which required APA compliance, it certainly does not have authority to do so under subdivision (b)'s vague APA exemption.

8. Restriction on Removing "Bullet Buttons" (Cal. Code Regs., tit. 11, § 5477)

For the Court's convenience, California Code of Regulations, title 11, section 5477 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." DOJ describes the regulation as "prohibiting ***post-registration*** modification" of *already registered* firearms. (Resp. Br. at p. 52.) However, DOJ also repeatedly concedes that its APA exemption is limited to implementing the "registration process" under section 3900, subdivision (b). (Resp. Br. at pp.15, 19-22, 29, 32-38, 44-53.) Because section 5477 regulates purely post-registration activity, it has nothing to do with the registration *process* and does not qualify for subdivision (b)'s APA exemption.

Yet DOJ argues that it has the authority to adopt a regulation under subdivision (b) that has no effect until *after* registration has taken place and continues in effect indefinitely. According to the DOJ, this is necessary to avoid abuse of the registration process. (Resp. Br. at pp. 52-53.) But that is beyond its mandate provided by subdivision (b). At least there is a reasonable doubt about whether it is. And that is fatal to DOJ's argument because "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." (*Cal. Sch. Bds. Assn.*, *supra*, 186 Cal.App.4th at p. 1328.)

Even if section 5477 did sufficiently relate to the registration process so that it qualified for subdivision (b)'s APA exemption, it still unlawfully expands the AWCA, which says nothing about whether "bullet buttons" can ever be removed from an "assault weapon" post-registration. (Pen. Code, § 30900, subd (b).) The AWCA exempts from its possession restriction owners of registered "assault weapons." (*Id.*, § 30945.) That exemption does not depend, at least not expressly, on which definition of "assault weapon" a particular firearm falls under. By declaring that owners cannot remove a "bullet button" from a registered "assault weapon" because doing so would convert the firearm into another type of "assault weapon," as section 5477 does, it unlawfully expands the scope of the APA and is thus void.

DOJ also argues that the Legislature could not have intended to allow removal of "bullet buttons" post-registration. (Resp. Br. at pp. 52-53.) But that is a huge assumption. One DOJ is not entitled to make. Because Appellants have raised a reasonable dispute about its interpretation, as explained above, DOJ cannot unilaterally decide the issue, absent at minimum a properly adopted regulation, which

section 5477 is not.

C. DOJ Does Not Dispute that Appellants Meet the Remaining Elements for a Writ of Mandate to Issue

Although Appellants invited DOJ to do so, DOJ makes no argument that Appellants do not satisfy all other requirements for a writ of mandate to issue here. (See A.O.B. at p. 48.) Nor did the trial court address the issue. Thus, should this Court agree with Appellants on any of the Challenged Regulations being invalid, it should reverse the trial court and enjoin DOJ from enforcing each such invalid regulation.

CONCLUSION

For the foregoing reasons, Appellants ask this Court to reject DOJ's mootness arguments, resolve the issues on appeal, and overturn both the trial court's order granting the demurrer as to all of Appellants' claims and its order denying Appellants' writ of mandate.

Date: October 8, 2019 **MICHEL & ASSOCIATES, P.C.**

s/ Sean A. Brady
Sean A. Brady
Counsel for Plaintiffs-Appellants

CERTIFICATE OF WORD COUNT

Under Rule 8.204, subdivision (c)(1), of the California Rules of Court, I hereby certify that the attached Appellants' Reply Brief is 1 ½-spaced, typed in a proportionally spaced, 13-point font, and the brief contains 9429 words of text, including footnotes, as counted by the word-count feature of the word-processing program used to prepare the brief.

Date: October 8, 2019 **MICHEL & ASSOCIATES, P.C.**

s/ Sean A. Brady
Sean A. Brady
Counsel for Plaintiffs-Appellants

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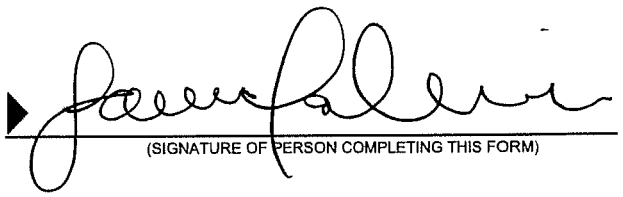

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