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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants and respondents State of California, acting by and through the California
3 Department of Justice, (DOJ) and Attorney General Xavier Becerra (AG Becerra) submit this
4 memorandum of points and authorities in support of their Demurrer to the First, Second and
5 Eighth causes of action set forth in the First Amended Complaint and Petition (First Amended
6 Complaint) filed by plaintiffs and petitioners, Franklin Armory, Inc. (Franklin Armory) and
7 California Rifle & Pistol Association (the Association).

8 **I. INTRODUCTION**

9 Franklin Armory and the Association seek a writ of mandate, injunctive relief, and
10 declaratory relief regarding their claim they have been unable to engage in transactions involving
11 Franklin Armory’s “Title 1” firearm because of a “technological barrier” in the electronic system
12 the DOJ utilizes to process applications for firearm transactions. Petitioners’ claims are moot
13 because, in August of 2020, the Title 1 was declared an “assault weapon” subject to the Roberti-
14 Roos Assault Weapons Control Act of 1989 (the Act). Petitioners do not allege that they are
15 unable to engage in lawful transactions involving the Title 1 now that it is declared an assault
16 weapon. Petitioners may argue they can seek relief regarding other firearms that are subject to the
17 same alleged technological barrier, but they do not allege that Franklin Armory manufactures, or
18 that any Association member has attempted to purchase, any such firearm. In fact, they do not
19 identify any specific model or manufacturer of such a firearm. Thus, Petitioners lack standing.

20 The electronic system at issue is the DROS Entry System (DES), which the DOJ utilizes to
21 process information submitted by individuals who seek to purchase or engage in other
22 transactions involving firearms. This brief will refer to an individual who seeks to buy or
23 otherwise obtain a firearm as a “purchaser.” Through the DES, a purchaser submits both personal
24 information, which the DOJ utilizes to conduct a background check to determine whether the
25 purchaser is ineligible to obtain the firearm, such as due to a felony conviction, and also
26 information about the firearm, which the DOJ collects for various law enforcement purposes.

27 Petitioners allege that the DES is only capable of processing information regarding
28 “handguns” (also referred to as “pistols” or “revolvers”), “rifles” and “shotguns.” They allege that

1 Franklin Armory’s Title 1 firearm does not fit within any of these categories. In the original
2 Complaint, filed on May 27, 2020, Petitioners alleged that the Title 1 was legal to purchase in
3 California but that Franklin Armory was unable to sell the firearm, and members of the
4 Association were unable to purchase it, due to the configuration of the DES. Petitioners sought a
5 writ of mandate and injunctive relief to compel the DOJ to modify the DES to accept information
6 regarding “undefined-type” firearms, namely, firearms that did not fit within any of the categories
7 - “handgun”/“pistol,” “rifle” or “shotgun.” In addition, Franklin Armory asserted causes of action
8 for damages to recover lost profits resulting from its inability to sell the Title 1.

9 On August 6, 2020, the Governor signed into law Senate Bill 118, which amended the Act
10 so that the Title 1 is currently categorized as an “assault weapon” regulated by the Act. As a result
11 of being declared an “assault weapon” subject to the Act, the Title 1 cannot be purchased or
12 transferred in California, subject to limited exceptions set forth in the Act.

13 Petitioners filed their First Amended Complaint after Senate Bill 118 was enacted. In the
14 First Amended Complaint, Petitioners acknowledge the categorization of the Title 1 as an “assault
15 weapon” subject to the Act. Despite this acknowledgement, Petitioners continue to seek a writ of
16 mandate and injunctive relief to require the DOJ to modify the DES to allow for transactions of
17 undefined-type firearms. However, they fail to allege how the DES currently precludes any lawful
18 purchases or transactions involving the Title 1, after the enactment of Senate Bill 118. To the
19 contrary, Petitioners allege that Senate Bill 118 “ban[s] the sale, transfer, and delivery of the Title
20 1.” (First Amended Complaint (FAC) at ¶94.) While Petitioners allege that other undefined-type
21 firearms exist, they fail to identify any specific model. Further, Petitioners do not allege that
22 Franklin Armory manufactures any such firearm (other than the Title 1). Nor do they allege that
23 any Association member attempted to purchase an undefined-type firearm but was unable to do
24 so because of a technological barrier in the DES.

25 In sum, Petitioners’ claims regarding the Title 1 are moot, and their cursory allegations
26 regarding the existence of other, unidentified, firearms that cannot be processed through the DES
27 do not show how either Franklin Armory or Association members are affected by the
28 configuration of the DES, and thus Petitioners fail to allege facts to support standing.

1 **II. SUMMARY OF FACTS**

2 In California, firearm purchases and other types of firearm transactions, including private
3 sales, gifts and loans, must be handled by a licensed gun dealer. When a purchaser goes to a gun
4 dealer to initiate a firearm transaction, the dealer is required to obtain information and create a
5 “record” of the transaction, which is known as a Dealer Record of Sale or “DROS.” Generally,
6 the DROS includes information regarding the purchaser and the firearm itself.

7 The dealer is required to submit the DROS to the DOJ. To facilitate this process, the DOJ
8 uses an electronic system known as the DROS Entry System or “DES.” One purpose of
9 submitting the DROS is to provide the DOJ with information to perform an eligibility check to
10 determine whether the purchaser is prohibited from obtaining the firearm. The DOJ also
11 maintains the information regarding the firearm in databases that are used for various law
12 enforcement purposes, such as investigating crimes involving firearms.

13 In the Penal Code, firearms are generally defined as “handguns” (also known as “pistols” or
14 “revolvers”), “rifles” and “shotguns.” “Rifles” and “shotguns” are sometimes referred to as “long
15 guns.” The DES utilizes these categories. Petitioners allege that the DES is configured so that it
16 cannot process information for a firearm that is not a “handgun”/“pistol”/“revolver,” a “rifle” or a
17 “shotgun.” Petitioners allege that the Title 1 fits within none of these categories, and as a result
18 dealers are unable to process transactions involving the Title 1 through the DES.

19 Petitioners filed this action on May 27, 2020, seeking a writ of mandate and injunctive
20 relief to require the DOJ to modify the DES, or develop an alternate process that would allow
21 processing of transactions involving the Title 1 and other undefined-type firearms. However, on
22 August 6, 2020, the legislature enacted amendments to the Act which resulted in the Title 1 being
23 declared an “assault weapon.” The Act allows only limited types of transactions involving assault
24 weapons. Under the amendments, any individual who has obtained a Title 1 prior to September 1,
25 2020, is allowed to keep the firearm, but they must register it with the DOJ by January 1, 2022.

26 After the Act was amended, Petitioners filed the First Amended Complaint wherein they
27 maintain the same claims for writ of mandate, and injunctive and declaratory relief. However,
28 they do not allege how the DES is currently precluding transactions involving the Title 1. Nor do

1 they allege that Franklin Armory manufactures any other undefined-type firearm. Petitioners
2 allege that other undefined-type firearms exist, but they do not identify any specific undefined-
3 type firearms, nor do they allege that any member of the Association has attempted to purchase an
4 undefined-type firearm. The First Amended Complaint is verified by Franklin Armory, but not by
5 the Association or any Association member.

6 **III. STATEMENT OF FACTS**

7 **A. Statutory Categories of Firearms**

8 Under the Penal Code, there are three basic types of “firearms”¹: “handguns,” which are
9 also referred to as “pistols” and “revolvers;” “rifles;” and “shotguns.”

10 A “handgun” is generally a firearm that has a barrel length less than 16 inches and can be
11 concealed on a person, and is synonymous with the terms “pistol,” “revolver” and “firearm
12 capable of being concealed upon the person.” (Pen. Code, §§16530, subd. (a), 16640, subd. (a).)
13 Penal Code section 17090 defines “rifle” for purposes of specific code sections as “a weapon
14 designed or redesigned, made or remade, and intended to be fired from the shoulder and designed
15 or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire
16 only a single projectile through a rifled bore for each single pull of the trigger.” Penal Code
17 section 17190 defines “shotgun” for purposes of specific code sections as “a weapon designed or
18 redesigned, made or remade, and intended to be fired from the shoulder and designed or
19 redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire
20 through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull
21 of the trigger.”² The term “long gun” is generally used to refer to rifles and shotguns. (See, e.g.,
22 Pen. Code, §16865.)

23 **B. Statutory Restrictions on Ownership and Possession of Firearms**

24 California law prohibits various categories of people from purchasing or possessing a
25 firearm. Examples of prohibited persons include any individual who has been convicted of, or has

26 ¹ Penal Code section 16520 defines “firearm” as “a device, designed to be used as a
27 weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other
28 form of combustion.”

² A “handgun” can also be “a short-barreled rifle or a short-barreled shotgun.” (Pen. Code,
§16530, subd. (b).)

1 an outstanding warrant for, a felony or a crime specified in Penal Code section 23515 (Pen. Code,
2 §29800), any probationer whose terms of probation prohibit the possession of a firearm (Pen.
3 Code, §29815), any individual who is prohibited from possessing a firearm pursuant to a
4 temporary restraining order, injunction or protective order issued by a court in California or
5 elsewhere (Pen. Code, §29825), and any individual who has been adjudicated by a court under
6 various statutory schemes to have a mental disorder and present a danger to themselves or others
7 (Welf. & Inst. Code, §8103).

8 An individual must be at least 21 years old to purchase or otherwise obtain a firearm from a
9 dealer. (Pen. Code, §27510, subd. (a).) There are exceptions listed in Penal Code section 27510,
10 subdivision (b), for individuals at least 18 years old who seek to purchase or obtain a “firearm
11 that is not a handgun or semiautomatic centerfire rifle.”

12 **C. Purchases and Other Transactions Involving Firearms Must Be Handled**
13 **by a Licensed Dealer; Dealers are Required to Create a Dealer Record of**
14 **Sale Regarding Each Transaction**

15 In California, individuals generally must purchase firearms through a licensed dealer. (Pen.
16 Code, §26500, subd. (a).) In addition, individuals must also have a licensed dealer process
17 transfers of firearms, including private sales, gifts and loans. (Pen. Code, §§27545, 28050.)

18 When an individual goes to a gun dealer to initiate a purchase or other transaction involving
19 a firearm, the dealer is required to obtain information and create a “record” of the transaction.
20 (Pen. Code, §28100, subd. (a).) This record is referred to as a Dealer Record of Sale or “DROS.”
21 Various information about the firearm is required to be included on the DROS, such as “[t]he
22 make of firearm,” “Manufacturer’s name if stamped on the firearm,” “Model name or number, if
23 stamped on the firearm,” “Caliber,” and “Type of firearm.” (Pen. Code, §28160, subd. (a).) The
24 DROS must also include information regarding the “purchaser”³ such as their name, date of birth,
25 local and permanent addresses, place of birth, occupation, gender, physical description, all legal
26 names and aliases ever used, and a yes or no answer whether they are in any of the categories of
27 persons prohibited from purchasing a firearm. (*Ibid.*) The dealer must transmit the DROS to the

28 ³As used in this brief, “purchase” includes a purchase, loan or other transfer, and
“purchaser” includes a purchaser or transferee of a firearm or the person being loaned a firearm.
(See Pen. Code, §28100, subs. (a),(b) [same definitions].)

1 DOJ and then is required to wait at least ten days before completing the purchase and delivering
2 the firearm to the purchaser, assuming the result of the background check has been received by
3 then. (Pen. Code, §§26815, subds. (a),(b), 27540, subd. (a).)

4 Pursuant to Penal Code section 28205, subdivision (c), the DROS must be submitted to the
5 DOJ electronically, “except as permitted by the [DOJ].”⁴ (Pen. Code, §28205, subd. (c).) Penal
6 Code section 28155 provides that “[t]he [DOJ] shall prescribe the form of the register and the
7 record of electronic transfer pursuant to Section 28105.” As Petitioners allege, “[t]he method
8 established by the DOJ pursuant to Penal Code section 28205(c) for the submission of purchaser
9 information required by Penal Code section 28160, subdivision (a), is DES. [¶] The DES is a
10 web-based application designed, developed and maintained by the DOJ and used by firearm
11 dealers to report the required information.” (FAC at ¶¶50-51.)

12 **D. The Department of Justice’s Role In Firearm Transactions**

13 The DOJ’s role once it receives a DROS is set forth in Penal Code section 28220.

14 First, when the DOJ receives a DROS, it “shall examine its records, as well as those records
15 that it is authorized to request from the State Department of State Hospitals pursuant to Section
16 8104 of the Welfare and Institutions Code, in order to determine if the purchaser is a person
17 described in subdivision (a) of Section 27535, or is prohibited by state or federal law from
18 possessing, receiving, owning, or purchasing a firearm.”⁵ (Pen. Code, § 28220, subd. (a).) The
19 statute does not require any action by the DOJ if it fails to find any reason why the purchaser
20 cannot obtain the firearm; in this situation, the dealer is allowed to transfer the firearm to the
21 purchaser after the ten-day waiting period required by Penal Code sections 26815 and 27540. On
22 the other hand, “[i]f the [DOJ] determines that the purchaser is prohibited by state or federal law
23 from possessing, receiving, owning, or purchasing a firearm or is a person described in
24 subdivision (a) of Section 27535, it shall immediately notify the dealer” and the local law
25 enforcement agency of its determination. (Pen. Code, §28220, subd. (c).)

26 ⁴ In the past, DROS information could be submitted by mail or telephone, but since
27 January 1, 2003, only electronic submission is allowed, “except as permitted by the [DOJ].” (Pen.
Code, §28205, subd. (c).) The DROS cannot be submitted telephonically. (Pen. Code, §28205.)

28 ⁵ Penal Code section 27535, subdivision (a), prohibits individuals from submitting more
than one application to purchase a “handgun” during any 30-day period.

1 If the records reviewed by the DOJ indicate the purchaser *might* be prohibited from
2 purchasing the firearm, the DOJ is required to notify the dealer to delay the transfer beyond the
3 ten-day waiting period. The DOJ then has up to 30 days to investigate and it must inform the
4 dealer if it determines whether the purchaser is prohibited, or is not prohibited, from possessing
5 the firearm. (Pen. Code, § 28220, subd. (f)(3)(A),(B).) If the DOJ cannot definitively determine
6 whether or not the purchaser is prohibited from possessing a firearm, the DOJ notifies the dealer
7 of this fact “and the dealer may then immediately transfer the firearm to the purchaser[.]” (Pen.
8 Code, § 28220, subd. (f)(4).)

9 **E. Information Contained in the Dealer Record of Sale is Maintained in**
10 **Databases Operated by the Department of Justice for Law Enforcement**
11 **Purposes**

12 The DOJ is also required to maintain information it receives from each DROS in databases
13 that are used for law enforcement purposes, including “to assist in the investigation of crime, . . .
14 the arrest and prosecution of criminals, and the recovery of lost, stolen, or found property.” (Pen.
15 Code, §11106, subd. (a)(1).)

16 **F. Petitioners’ Alleged “Technological Barrier” to Sales of the Title 1**

17 Petitioners allege that Franklin Armory “manufactures a series of firearms which are neither
18 ‘rifles,’ nor ‘pistols,’ nor ‘shotguns’ under California law and which are designated with the
19 model name ‘Title 1’ by FAI.” (FAC at ¶2.) They also allege that, through the DES, the DOJ has
20 “instituted a technological barrier” that does not allow gun dealers to process the Title 1 and other
21 “undefined-type” firearms. (FAC at ¶60.) Petitioners explain this technological barrier as follows:

22 [B]y design, when the DES user is inputting the designated information into the DES,
23 they must input information related to the gun type (‘long gun’ or ‘handgun’). Upon
24 selecting ‘long gun,’ the DES system is designed to and functions to self-populate a
25 subset of fields, and it requires one of three options to be designated before the dealer
26 may proceed with the completion of the form and submission of the required
27 information to the DOJ. Those three options are: ‘rifle,’ ‘rifle/shotgun,’ ‘shotgun.’
28 Unlike the subset of fields that self-populate for ‘Color,’ ‘Purchaser Place of Birth,’
and [‘]Seller Place of Birth’, each of which contains the catchall ‘other’ options, the
‘long guns’ subset of fields does not contain the ‘other’ option.”

(FAC at ¶55.)

Further, Petitioners allege that the DOJ could allow for transactions involving undefined-
type firearms to be processed by making technological changes to the DES, or by providing

1 instructions to dealers to identify the firearm as another type of firearm and enter specific notes
2 into text fields in the DES. (FAC at ¶¶61-63.)

3 **G. The Title 1 Is Declared to Be an Assault Weapon**

4 Petitioners filed this action on May 27, 2020. Subsequently, on August 6, 2020, the Act was
5 amended to include in the definition of “assault weapon” any “semiautomatic centerfire firearm
6 that is not a rifle, pistol, or shotgun” that has one or more specified characteristics. (Pen. Code,
7 §30515, subds. (a)(9),(10),(11).) Under these amendments, the Title 1 became an “assault
8 weapon” subject to the Act. (FAC at ¶105.)

9 Under this legislation, any individual who has obtained, prior to September 1, 2020, a
10 firearm that is defined as an assault weapon under Penal Code section 30515, subdivisions (a)(9),
11 (10) and (11), is allowed to keep the firearm, but they must register it with the DOJ by January 1,
12 2022. (Pen. Code, §30685.) To register, an individual must submit an application to the DOJ
13 pursuant to a process to be established by the DOJ in a regulation. (Pen. Code, §30900, subd. (c).)

14 **IV. PLAINTIFFS’ CAUSES OF ACTION**

15 At this time, Petitioners are proceeding only on their First, Second and Eighth causes of
16 action.⁶ The first cause of action is for injunctive and declaratory relief. Petitioners seek a
17 declaration that the current condition of the DES works as an underground regulation prohibiting
18 transactions involving undefined-type firearms, and that this underground regulation violates the
19 Administrative Procedure Act. (FAC at ¶¶109-117.) They also seek a declaration establishing that
20 “[t]here exists a category of firearm that is neither a ‘rifle,’ nor ‘shotgun,’ nor ‘handgun’ under
21 California law,” that the DES does not allow transactions involving this category of firearm, that
22 as a result the DOJ violated duties “including those found within Penal Code sections 28155,
23 28205, 28215, and 28220,” that the DOJ has a “present and ministerial duty to ensure that the
24 systems developed by the DOJ to facilitate the submission of information do not act as barriers to
25 the submission of the required information necessary for the sale, loan and/or transfer of lawful

26 _____
27 ⁶ The First and Second causes of action include requests for an injunction effectively
28 prohibiting the DOJ from enforcing the Act as to the Title 1. (FAC at ¶¶122, 129.) However,
Petitioners are not pursuing such relief at this time. Furthermore, such an injunction would violate
Code of Civil Procedure section 526, subdivisions (b)(4) and (6).

1 firearms,” and that the DOJ has “intentionally instituted the technological barriers” and has
2 “intentionally delayed in removing the technological barriers.” (FAC at ¶118.) In this cause of
3 action, Petitioners also seek an injunction prohibiting the DOJ “from enforcing administrative
4 and/or technological barriers that prevent the sale of lawful firearms, including but not limited to
5 the FAI Title 1.” (FAC at ¶121.)

6 Petitioners’ second cause of action is for writ of mandate directing the DOJ “to design,
7 implement, maintain and enforce updates to the DES system such that it does not proscribe the
8 lawful sale, transfer and loan of an entire class of lawful firearms, including the FAI Title 1 and
9 such that it comports with Penal Code sections 28155, 28205, 28215 and 28220.” (FAC at ¶128.)

10 Petitioners’ eighth cause of action is for declaratory and injunctive relief. This cause of
11 action appears to duplicate the First cause of action. Petitioners allege that the configuration of
12 the DES is a regulation that was not promulgated in compliance with the Administrative
13 Procedure Act, and is therefore invalid. (FAC at ¶¶186-195.) Petitioners seek injunctive relief, but
14 it is unclear what specific injunctive terms they seek. (See FAC at ¶192.)

15 **V. ARGUMENT**

16 Petitioners’ claims based on the Title 1 are moot. Petitioners alleged that the Title 1 is a
17 lawful firearm but, because of the DES, Franklin Armory cannot sell it and the Association
18 members cannot purchase it. However, the Title 1 is now an “assault weapon” under the Act.
19 Petitioners do not allege that they could, but for the configuration of the DES, engage in
20 transactions involving the Title 1.

21 Furthermore, Petitioners lack standing to pursue claims based on undefined-type firearms
22 other than the Title 1. Franklin Armory does not allege that it manufactures any other undefined-
23 type firearm. There are no allegations that any Association member has attempted to purchase any
24 undefined-type firearm and been unable to do so because of the configuration of the DES.
25 Moreover, neither the Association nor any member has verified the First Amended Complaint.

26 **A. A Demurrer Tests the Legal Sufficiency of a Complaint**

27 A demurrer tests the legal sufficiency of a complaint by raising questions of law regarding
28 the complaint’s form or content. (Code Civ. Proc., §589, subd. (a).) A demurrer should be granted

1 where the complaint “does not state facts sufficient to constitute a cause of action.” (Code Civ.
2 Proc., § 430.10, subd. (e).) The court treats a demurrer as admitting properly pleaded material
3 facts, but does not assume the truth of contentions, deductions, or conclusions of fact or law.
4 (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Nor does the court assume the truth of allegations
5 contradicted by matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a)). A
6 demurrer should also be granted if the complaint is “uncertain.” (Code Civ. Proc., §430.10, subd.
7 (f)). A complaint is “uncertain” when its allegations are “ambiguous” or “unintelligible.” (*Ibid.*)

8 **B. Petitioners’ Claims regarding Sales of the Title 1 Are Moot**

9 In their original Complaint, Petitioners alleged that the Title 1 could lawfully be sold in
10 California. (Complaint at ¶3.) At the time Petitioners filed the Complaint in May of 2020, “assault
11 weapons” were defined in the Act as specified “rifles,” “pistols” and “shotguns”⁷ (Pen. Code,
12 §30510) or “rifles,” “pistols” and “shotguns” with one or more specified characteristics (*id.*,
13 §30515, subds. (a)(1)-(8).) As Petitioners alleged, Title 1 model firearms “are neither ‘rifles,’
14 ‘pistol,’ nor ‘shotguns’ under California law.” (Complaint at ¶3.) Assuming this is true, Title 1
15 firearms were not “assault weapons” under the Act at the time Petitioners filed this action.

16 However, since that time, the legislature amended the Act, and specifically Penal Code
17 section 30515, to include in the definition of “assault weapon” any “semiautomatic centerfire
18 firearm that is not a rifle, pistol, or shotgun” that has one or more specified characteristics. (Pen.
19 Code, §30515, subds. (a)(9)-(11).) Petitioners acknowledge that, under these amendments, the
20 Title 1 became an “assault weapon” subject to the Act on August 6, 2020. (FAC at ¶105.)

21 Under the Act, “assault weapons” can only be manufactured and sold as permitted by the
22 Act. (Pen. Code, §§30600, 30605.) Petitioners do not allege that, since August 6, 2020, the
23 configuration of DES has prevented them from engaging in any transfers of the Title 1.
24 Furthermore, while the legislation allows individuals who obtained a Title 1 prior to September 1,
25 2020, to keep the firearm, on the condition that they register it, Petitioners allege that Franklin

26 ⁷ The definitions of “rifle” and “shotgun” provided in Penal Code sections 17090 and
27 17190 apply to specified sections of the Penal Code, which do not include sections 30510 or
28 30515. The definition of “rifle” to be used for the identification of assault weapons as set forth in
section 30515 is found in the California Code of Regulations. (Cal. Code Regs., tit. 11, §§5460,
5471, subd. (ee).) This definition is consistent with the definition in Penal Code section 17090.

1 Armory was not able to sell any Title 1 firearms before the September 1 deadline. (FAC at ¶106.)

2 “California courts will decide only justiciable controversies.” (*Wilson & Wilson v. City*
3 *Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) One component of justiciability is
4 mootness. (*Ibid.*) Moot cases are “[t]hose in which an actual controversy did exist but, by the
5 passage of time or a change in circumstances, ceased to exist.” (*Ibid.* [quoting 3 Witkin, Cal.
6 Procedure (5th ed. 2008) Actions, § 21, pp. 85, 86].) “When events render a case moot, the court,
7 whether trial or appellate, should generally dismiss it.” (*Wilson & Wilson, supra*, 191 Cal.App.4th
8 at p. 1575.) This rule applies to claims for declaratory relief (*id.* at p. 1582), claims for injunctive
9 relief (*City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 959) and
10 petitions for writ of mandate (*Daily Journal Corp. v. County of Los Angeles* (2009) 172
11 Cal.App.4th 1550, 1557).

12 Petitioners’ claims regarding the Title 1 were premised on their allegation it was lawful for
13 the public to purchase the Title 1. As a result of the amendments to the Act, that is no longer the
14 case. Furthermore, Petitioners do not allege that the DES is preventing them from engaging in
15 lawful transactions involving the Title 1. Therefore, their claims regarding the Title 1 are moot.

16
17 **C. Petitioners Lack Standing to Pursue Relief Based on the Alleged Existence
of Other, Unnamed Undefined-Type Firearms**

18 Petitioners may argue that they have standing to seek writ, injunctive and declaratory relief
19 in this case based on their allegation that other undefined-type firearms exist. (See, e.g., FAC at
20 ¶56 [referring to “firearms of undefined subtypes, including the FAI Title 1”].) Any such
21 argument fails, however, because Petitioners do not identify any specific firearm, other than the
22 Title 1, that is an “undefined-type” firearm. They do not allege that Franklin Armory
23 manufactures any undefined-type firearm other than the Title 1. Nor do they allege that any
24 member of the Association has tried to purchase any such firearm but was unable to do so
25 because of the DES. As a result, neither Franklin Armory nor the Association has alleged
26 sufficient facts to establish standing to pursue a writ of mandate, other injunctive relief or
27 declaratory relief. “Standing is a threshold issue necessary to maintain a cause of action, and the
28 burden to allege and establish standing lies with the plaintiff.” (*Mendoza v. JPMorgan Chase*

1 *Bank, N.A.* (2016) 6 Cal.App.5th 802, 810 [citations omitted].)

2
3 **1. Petitioners Fail to Allege a Beneficial Right as Required to Establish
Standing to Pursue a Writ of Mandate**

4 “There are two essential requirements to the issuance of a traditional writ of mandate: (1) a
5 clear, present and usually ministerial duty on the part of respondent, and (2) a clear, present and
6 beneficial right on the part of the petitioner to the performance of that duty.” (*California Assn. for*
7 *Health Services at Home v. State Dept. of Health Services* (2007) 148 Cal.App.4th 696, 704.) To
8 satisfy the second element, a party must have a “special interest over and above the interest of the
9 public at large.”⁸ (*Id.* at p. 706.) This standard “is equivalent to the federal ‘injury in fact’ test,
10 which requires a party to prove by a preponderance of the evidence that it has suffered ‘an
11 invasion of a legally protected interest that is “(a) concrete and particularized, and (b) actual or
12 imminent, not conjectural or hypothetical.”” (*Associated Builders and Contractors, Inc. v. San*
13 *Francisco Airports Com.* (1999) 21 Cal.4th 352, 362 [citation omitted].)

14 In this matter, neither Franklin Armory nor the Association has alleged facts to satisfy this
15 standing requirement. Franklin Armory does not allege that it manufactures any firearm, other
16 than the Title 1, that is an “undefined-type” firearm. Nor is there any allegation in the First
17 Amended Complaint that, other than the Title 1, a specific undefined-type firearm exists, or that
18 any member of the Association has attempted to purchase such a firearm but was unable to do so
19 because of the DES. Without allegations identifying a specific undefined-type weapon that a
20 member of the Association has attempted to purchase, the Association’s claim is entirely
21 “conjectural” and “hypothetical.” (*Id.* at p. 362.)

22 Furthermore, the First Amended Complaint was not verified by the Association or any
23 member of the Association. Pursuant to Code of Civil Procedure section 1086, a writ of mandate
24 can only be issued based on a “verified petition of the party beneficially interested.” Thus,
25 standing cannot be established in this matter based on alleged injuries to Association members.

26
27 ⁸ “To establish associational standing, plaintiffs must demonstrate that their members
28 would have standing to sue in their own right.” (*California Assn. for Health Services at Home,*
supra, 148 Cal.App.4th at p. 707.)

1 **2. Petitioners Fail to Allege Facts Showing an Actual or Impending**
2 **Injury As Required to Established Standing to Seek Injunctive Relief**

3 Petitioners seek injunctive relief under Code of Civil Procedure sections 525 and 526. (FAC
4 at ¶121.) “To obtain an injunction, a party must show injury *as to himself*.” (*Connerly v.*
5 *Schwarzenegger* (2007) 146 Cal.App.4th 739, 748 [italics in original].) “A person who invokes
6 the judicial process lacks standing if he, or those whom he properly represents, ‘does not have a
7 real interest in the ultimate adjudication because [he] has neither suffered nor is about to suffer
8 any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues
9 will be adequately presented.’” (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707
10 [brackets in original; quoting *California Water & Telephone Co. v. County of Los Angeles* (1967)
11 253 Cal.App.2d 16, 22–23].) Furthermore, “injunctions cannot be predicated on the proponent’s
12 fear of something that may happen in the future.” (*Connerly, supra*, 146 Cal.App.4th at p. 750.)

13 In *Schmier*, the plaintiff sought an injunction to require the Courts of Appeal to publish all
14 opinions. The court held that the plaintiff lacked standing because “the complaint does not
15 identify any specific injury appellant or those he purports to represent have suffered or will suffer
16 due to the nonpublication or depublication of an appellate opinion. Absent such an allegation,
17 appellant lacks standing in this action.” (*Schmier, supra*, 78 Cal.App.4th at p. 708.)

18 Again, Petitioners do not allege any facts showing that Franklin Armory or any Association
19 member has suffered or will suffer any injury due to the alleged limitations of the DES. They do
20 not allege that Franklin Armory manufactures any “undefined-type” firearm (other than the Title
21 1). Nor do they allege that any Association member attempted to purchase an undefined-type
22 firearm but was unable to do so because of the DES. In fact, other than the Title 1, no specific
23 undefined-type firearm is identified in the First Amended Complaint. Therefore, neither Franklin
24 Armory nor the Association has alleged facts to establish standing.

25 **3. Petitioners Fail to Allege an Actual Controversy as Required for**
26 **Declaratory Relief**

27 Petitioners seek declaratory relief regarding the DES. Declaratory relief is proper only
28 where there is an “actual controversy relating to the legal rights and duties of the respective
parties[.]” (Code Civ. Proc., §1060.) This general standard applies to the extent Petitioners seek

1 declaratory relief under the Administrative Procedure Act, because declaratory relief can only be
2 obtained under the Administrative Procedure Act “in accordance with the Code of Civil
3 Procedure.” (Gov. Code, §11350, subd. (a).) As a result, declaratory relief regarding an alleged
4 violation of the Administrative Procedure Act is proper only if there is an “actual controversy”
5 under Civil Procedure section 1060. (*California Department of Consumer Affairs v. Superior*
6 *Court* (2016) 245 Cal.App.4th 256, 262.) In *California Department of Consumer Affairs*, the
7 court concluded that the plaintiffs’ claims for declaratory relief regarding alleged underground
8 regulations relating to the department’s certification of dispute resolution programs operated by
9 car manufacturers under California’s “lemon law” were properly dismissed because the plaintiffs
10 had failed to allege “a current dispute with an automobile manufacturer arising under California’s
11 lemon law” or “any ongoing unresolved car repair issues.” (*Id.* at p. 263.)

12 In this case, Petitioners have failed to allege any actual controversy regarding the DES.
13 Their claims regarding Franklin Armory’s Title 1 firearm are moot. They do not allege the
14 existence of any specific undefined-type firearm (other than the Title 1), that Franklin Armory
15 manufactures any such firearm (other than the Title 1), or that any Association member attempted
16 to purchase such a firearm but was unable to do so because of the DES.

17 Petitioners may argue that an Association member may in the future seek to purchase an
18 undefined-type firearm. However, such a claim, involving an unknown firearm and a hypothetical
19 transaction, does not present a ripe controversy. “The ‘actual controversy’ language in Code of
20 Civil Procedure section 1060 encompasses a probable future controversy relating to the legal
21 rights and duties of the parties. For a probable future controversy to constitute an ‘actual
22 controversy,’ however, the probable future controversy must be ripe.” (*Environmental Defense*
23 *Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885 [citations
24 omitted].) Ripeness is a “basic prerequisite to judicial review of administrative acts” that
25 “prevents courts from issuing purely advisory opinions” and recognizes that “judicial
26 decisionmaking is best conducted in the context of an actual set of facts so that the issues will be
27 framed with sufficient definiteness to enable the court to make a decree finally disposing of the
28 controversy.” (*Pacific Legal Foundation v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 169, 170.)

1 Courts apply a two-part test for ripeness that considers (1) “the fitness of the issues for judicial
2 decision,” and (2) “the hardship to the parties of withholding court consideration.” (*Id.* at p. 170
3 [internal quotation marks and citation omitted].) Under the first prong, “courts will decline to
4 adjudicate a dispute if the abstract posture of [the] proceeding makes it difficult to evaluate . . .
5 the issues, if the court is asked to speculate on the resolution of hypothetical situations, or if the
6 case presents a contrived inquiry.” (*Stonehouse Homes v. City of Sierra Madre* (2008) 167
7 Cal.App.4th 531, 540 [internal quotation marks and citations omitted].) The second prong
8 requires “an imminent and significant hardship inherent in further delay” of judicial review. (*Id.*
9 at p. 542 [quotation marks and citation omitted].)

10 Here, without knowing the circumstances of a hypothetical future transaction, including
11 what specific firearm is involved, it is speculation to assume how a gun dealer might interpret the
12 category of the firearm, what efforts the gun dealer might make to request an alternative process
13 from the DOJ, and what the DOJ’s position might be. Furthermore, there is no “significant
14 hardship inherent in further delay” of judicial review. When, and if, an Association member
15 attempts to purchase an undefined-type firearm but is unable to do so because of the DES, then a
16 ripe controversy might exist.

17 In sum, Petitioners fail to allege an actual controversy that is proper for declaratory relief.

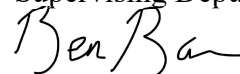
18 CONCLUSION

19 For the foregoing reasons, the DOJ and AG Becerra request the Court dismiss Petitioners’
20 First, Second and Eighth causes of action as moot and because Petitioners lack standing.

21 Dated: October 30, 2020

Respectfully Submitted,

22 XAVIER BECERRA
23 Attorney General of California
24 MARK T. CUMBA
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Franklin Armory, Inc. v. California Department of Justice**
Case No.: **20STCP01747**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **October 30, 2020**, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER BY DEFENDANTS AND RESPONDENTS CALIFORNIA DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL XAVIER BECERRA TO THE FIRST AMENDED COMPLAINT AND PETITION [FIRST, SECOND AND EIGHTH CAUSES OF ACTION]** by placing a true copy thereof enclosed in a sealed envelope in the *internal mail collection system* at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

C.D. MICHEL
Jason A. Davis
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Long Beach, CA 90802

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 30, 2020**, at Los Angeles, California.

Whitney A. Sims

Declarant

/s/ Whitney A. Sims

Signature



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