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10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF LOS ANGELES
13

14 **FRANKLIN ARMORY, INC. AND**
15 **CALIFORNIA RIFLE & PISTOL**
16 **ASSOCIATION, INCORPORATED,**
17
Petitioners-Plaintiffs,
18
v.
19 **CALIFORNIA DEPARTMENT OF**
JUSTICE, XAVIER BECERRA, IN HIS
20 **OFFICIAL CAPACITY AS ATTORNEY GENERAL**
FOR THE STATE OF CALIFORNIA, AND DOES
21 **1-10,**
22
Respondents-Defendants.
23

Case No. 20STCP01747

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF THE
DEMURRER TO THE FIRST, SECOND
AND EIGHTH CAUSES OF ACTION TO
THE SECOND AMENDED COMPLAINT
AND PETITION

Date: June 3, 2021
Time: 9:30 a.m.
Dept: 85

Honorable James C. Chalfant

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. Introduction..... 6

II. The Court’s Ruling On the Demurrer to the First Amended Complaint..... 7

III. Allegations of the Second Amended Complaint..... 8

IV. Argument 10

 A. A Demurrer Is an Appropriate Test of the Legal Sufficiency of the
 Second Amended Complaint and Petition 10

 B. The Demurrer to the Second Cause of Action Should Be Sustained
 Without Leave to Amend Because Petitioners Have Not, and
 Cannot, Allege Sufficient Facts to Establish a Basis for a Writ of
 Mandate..... 11

 1. Petitioners Fail to Allege Sufficient Facts Establishing a
 Beneficial Right as Required to Establish Standing to
 Pursue a Writ of Mandate 11

 2. Petitioners Fail to Allege Facts Establishing Public Interest
 Standing 14

 3. Petitioners Fail to Allege Facts Establishing a Ripe
 Controversy 14

 4. Petitioners Fail to Allege Sufficient Facts Establishing a
 Mandatory, Ministerial Duty for the DOJ to Modify the
 DES 15

 C. The Demurrer to the First and Eighth Causes of Action Should Be
 Sustained Without Leave to Amend Because Requests for
 Declaratory and Injunctive Relief are Types of Remedies and Not
 Independent Causes of Action 18

 D. The Demurrer to the Eighth Cause of Action Should Be Sustained
 Without Leave to Amend Because, As a Matter of Law, the
 Configuration of the DES Is Not a “Regulation” Governed by the
 Administrative Procedure Act..... 19

V. Conclusion..... 20

1 **TABLE OF AUTHORITIES**

2 **Page**

3
4 **Cases**

5 *A.B. Concrete Coating Inc. v. Wells Fargo Bank, National Association* (E.D. Cal.,
6 2020)
7 2020 WL 5820613 18

8 *Adelman v. Associated Intern. Ins.* (2001)
9 90 Cal.App.4th 352 10

10 *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011)
11 197 Cal.App.4th 693 16, 17, 18

12 *Batt v. City and County of San Francisco* (2007)
13 155 Cal.App.4th 65 18

14 *California Department of Consumer Affairs v. Superior Court* (2016)
15 245 Cal.App.4th 256 19

16 *Chapman v. Superior Court* (2005)
17 130 Cal.App.4th 261 10, 11

18 *Coachella Valley Unified School Dist. v. State of California* (2009)
19 176 Cal.App.4th 93 18, 19

20 *Consumer Cause, Inc. v. Johnson & Johnson* (2005)
21 132 Cal.App.4th 1175 14

22 *County of San Diego v. State of California* (2008)
23 164 Cal.App.4th 580 11, 16

24 *Embarcadero Municipal Improvement Dist. v. County of Santa Barbara* (2001)
25 88 Cal.App.4th 781 11, 12

26 *Environmental Defense Project of Sierra County v. County of Sierra* (2008)
27 158 Cal.App.4th 877 15

28 *Goodman v. Kennedy* (1976)
18 Cal.3d 335 10

McWilliams v. City of Long Beach (2013)
56 Cal.4th 613 18

Mendoza v. JPMorgan Chase Bank, N.A. (2016)
6 Cal.App.5th 802 11

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<i>Mesa Shopping Center-East, LLC v. O Hill</i> (2014) 232 Cal.App.4th 890	18
<i>Monterey Coastkeeper v. Monterey County Water Resources Agency</i> (2017) 18 Cal.App.5th 1	14, 15
<i>Mooney v. Garcia</i> (2012) 207 Cal.App.4th 229	16
<i>New York Times Co. v. Superior Court</i> (1990) 51 Cal.3d 453	14
<i>Pacific Legal Foundation v. California Coastal Com.</i> (1982) 33 Cal.3d 158	15
<i>Pinto Lake MHP v. County of Santa Cruz</i> (2020) 56 Cal.App.5th 1006	10
<i>Ramirez v. USAA Casualty</i> (1991) 234 Cal.App.3d 391	10
<i>Reynolds v. City of Calistoga</i> (2014) 223 Cal.App.4th 865	14
<i>San Bernardino Public Employees Assn. v. City of Fontana</i> (1998) 67 Cal.App.4th 1215	15
<i>Save the Plastic Bag Coalition v. City of Manhattan Beach</i> (2011) 52 Cal.4th 155	14
<i>SJJC Aviation Services, LLC v. City of San Jose</i> (2017) 12 Cal.App.5th 1043	11, 14
<i>The H.N. & Frances C. Berger Foundation v. Perez</i> (2013) 218 Cal.App.4th 37	11, 15, 16
<i>Tidewater Marine Western, Inc. v. Bradshaw</i> (1996) 14 Cal.4th 557	19
<i>Tobe v. City of Santa Ana</i> (1995) 9 Cal.4th 1069	12
<i>Yamada Brothers v. Agricultural Labor Relations Bd.</i> (1979) 99 Cal.App.3d 112	11

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Administrative Protection Act..... 19, 20

Code Civ. Proc.

§ 430.10..... 10

§ 430.50..... 19

Gov. Code

§ 11340.5..... 19

§ 11340.9..... 20

§ 11342.600..... 19, 20

Pen. Code

§ 28100..... 17

§ 28155..... 9, 15, 17

§ 28205..... 9, 15, 16

§ 28210..... 17

§ 28215..... 9, 15, 17

§ 28220..... 9, 15, 17

Other Authorities

Cal. Prac. Guide Civ. Pro. Before Trial (Rutter Group 2021), §§ 7:156, 7:177 19

1 **I. Introduction**

2 Defendants and respondents State of California, acting by and through the California
3 Department of Justice, (“DOJ”) and former Attorney General Xavier 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 Second Amended Complaint and Petition (“SAC”) filed by
6 plaintiffs and petitioners, Franklin Armory, Inc. (“Franklin Armory”) and California Rifle &
7 Pistol Association (“Association”). The Second cause of action seeks a writ of mandate, and the
8 First and Eighth causes of action seek declaratory and injunctive relief. By order of this Court, all
9 other causes of action are stayed.

10 This case is premised on Petitioners’ allegation that some firearms, which they refer to as
11 “firearms with an undefined subtype,” cannot be sold or otherwise transferred in California
12 because of a “technological barrier” in the Dealer Record of Sale Entry System (“DES”) which is
13 utilized by dealers and the DOJ to process applications for firearm transactions. Petitioners’
14 original Complaint focused on a Franklin Armory firearm designated as the “Title 1.” The Title
15 1, which is a centerfire firearm, was subsequently classified as a banned assault weapon. Even
16 after this occurred, Petitioners filed a First Amended Complaint (“FAC”) in which they pursued
17 writ, declaratory and injunctive relief regarding the DES based on the Title 1 and other,
18 unidentified firearms. The Court held that Petitioners’ claims based on the Title 1 were moot
19 because it was classified as an assault weapon, and Petitioners failed to allege facts showing they
20 had standing to pursue relief based on the unidentified firearms.

21 Petitioners have now filed their SAC in which they allege the existence of a different
22 Franklin Armory firearm also designated with model name “Title 1,” which they describe as a
23 “.17 WSM (a rimfire caliber).” Petitioners contend that this rimfire Title 1 is an “undefined
24 subtype” firearm, but they fail to allege any of its features or characteristics. Petitioners also
25 identify three other categories of firearms they contend are “undefined subtype” firearms -
26 buntline revolvers, butterfly grip firearms, and barreled action firearms – but they do not identify
27 any specific models within these categories. Moreover, Petitioners fail to allege that any would-
28 be purchaser or dealer who has actually attempted, and failed, to transfer any of these firearms.

1 All they allege is that two individuals and one firearm dealer “seek” to buy or sell the rimfire
2 Title 1 or a buntline revolver. As a result, Petitioners still fail to allege facts to establish they
3 have standing to pursue writ, declaratory and injunctive relief regarding the DES. The SAC also
4 fails to allege facts establishing a ripe controversy.

5 In addition, Petitioners’ claim for a writ of mandate fails, as a matter of law, because the
6 statutes upon which the claim is based do not impose any mandatory, ministerial duty on the DOJ
7 that could support writ relief. The First and Eighth causes of action also fail because requests for
8 declaratory and injunctive relief are types of remedies and not independent causes of action.
9 Finally, the Eighth cause of action fails because it is premised on the meritless theory that the
10 DES constitutes a “regulation” subject to the Administrative Procedure Act.

11 Accordingly, Respondents request that the Court sustain this Demurrer without leave to
12 amend.

13 **II. The Court’s Ruling On the Demurrer to the First Amended Complaint**

14 On January 28, 2021, the Court sustained Respondents’ Demurrer to the FAC. The only
15 firearm model specifically pled in the FAC was the Franklin Armory Title 1, centerfire model.
16 The Court held that Petitioners’ claims were moot because sales and transfers of this firearm, due
17 to its classification as an assault weapon, are unlawful. (Order, Jan. 28, 2021, at pp. 4-6.)

18 The Court also held that Petitioners do not have standing because “the FAC does not allege
19 sufficient facts to demonstrate that Petitioners have a beneficial interest in the mandamus and
20 declaratory relief claims to compel DOJ to fix the DES process.” (Order, Jan. 28, 2021, at p. 7.)
21 The Court held that, “the same is true for the injunctive relief remedy.” (*Id.* at p. 9.) The Court
22 concluded that the FAC failed to sufficiently allege that Franklin Armory manufactures or
23 attempted to sell legal firearms that cannot be processed through the DES. (*Id.* at p. 7.) In this
24 regard, the Court held, “Petitioners must plead specific models to show standing.” (*Id.* at p. 6.)
25 The Court allowed leave to amend based on Petitioners’ proffer that they could amend to address
26 these deficiencies in a SAC.

27 Since the court has eliminated all claims relative to the Title 1 centerfire model, this
28 Demurrer will address only new firearms added to the SAC: the Title 1 rimfire model and three

1 types of firearms: Buntline revolvers, butterfly grip firearms and barreled action firearms.

2 **III. Allegations of the Second Amended Complaint**

3 Petitioners, in an attempt to allege in the SAC a firearm for which they have a beneficial
4 interest, changed the reference from the “FAI Title 1” (i.e., centerfire model¹) in the FAC to the
5 “FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms and barreled action
6 firearms”, also referred to as receivers, in the SAC. (See, e.g., SAC at ¶¶ 58-59, 118 (c-d).²)
7 Petitioners refer to these weapons as firearms with an “undefined subtype,” which Petitioners
8 define as firearms that do not fit under the statutory definition of “handgun,” “rifle” or “shotgun.”
9 (SAC at ¶¶ 26-27.) The term “FAI Title 1 series of firearms,” as used in the SAC, appears to be a
10 term coined by Petitioners to reference both the Title 1 centerfire and Title 1 rimfire models.
11 (SAC at ¶2.)

12 There are general allegations in the SAC that make separate reference to the Title 1
13 rimfire model which Petitioners call a rimfire variant of the Title 1. (SAC at ¶¶ 122, 127.)
14 However, the SAC fails to allege any specific part or component of the Title 1 rimfire model
15 other than to state that it is a .17 WSM rimfire caliber. (SAC at ¶2.) The SAC makes a general
16 and conclusory allegation that this firearm model is not a “handgun,” nor a “rifle,” nor a
17 “shotgun” as those terms are defined by California Law. (SAC at ¶27.) However, Petitioners fail
18 to allege any specific part or component of the Title 1 rimfire model which establishes why it is
19 not a handgun, rifle or shotgun.

20 As to buntline revolver, butterfly grip and barreled action firearms, these are general
21 categories or types of firearms and not specific models of a firearm. For example, Petitioners
22 refer to barreled action firearms as one of the most common types of firearms in the United
23 States. (SAC at ¶32.) The SAC fails to allege any specific model of these firearms.

24 In addition, there are no allegations of any actual efforts to purchase, sell or transfer the
25 firearms referenced in the SAC. Petitioners added four new paragraphs to the SAC that refer to
26 two members of the Association and a firearms dealer, but they allege only that the individuals

27 ¹ The rimfire model, or variant, was not mentioned in the FAC.

28 ² Paragraphs 58-59 in the SAC were paragraphs 55-56 in the FAC. Paragraph 118 is the same in both the SAC and the FAC.

1 and the dealer “seek” to acquire or sell the firearms at issue; (SAC at ¶¶99-102.) Petitioners
2 allege that Association member Ryan Fellows “seeks to acquire” a Title 1 rimfire model “but is
3 unable to acquire that firearm because of DEFENDANTS’ conduct described herein.” (SAC at
4 ¶99.) They similarly allege that Association member Beverly Epidendio “seeks to acquire a
5 buntline revolver but is prohibited from doing so due to DEFENDANTS’ conduct described
6 herein.” (SAC at ¶100.) The firearms dealer, Coyote Point Armory, “seeks to sell” a buntline
7 revolver and other lawful firearms including but not limited to the Title 1 rimfire model but is
8 prohibited from doing so due to defendants’ conduct. (SAC at ¶101.) Finally, there is a general
9 allegation that “many other members” of the Association “seek to acquire and/or sell”
10 “undefined subtype” firearms. (SAC at ¶102.)

11 As with the FAC, the underlying basis for Petitioners’ action centers around the inclusion
12 of a subtype menu in the DES which appears after a dealer selects a “long gun” transaction.
13 Petitioners take issue with the long gun subtype menu because it does not provide an option other
14 than “rifle,” “shotgun,” or “rifle/shotgun combination.” Petitioners assert that since none of the
15 alleged “undefined subtype” firearms fit the statutory definition of rifle or shotgun, a dealer
16 would be unable to process the transfer in the DES because there is not another option in the
17 subtype menu. (SAC at ¶¶58-59.)

18 This alleged issue with the subtype menu is what Petitioners refer to as an
19 “administrative” and/or “technological” barrier that improperly prevents sales of the Title 1
20 rimfire model, and the buntline revolver, butterfly grip and barreled action type firearms. (SAC
21 at ¶¶63, 64, 119.) Petitioners assert Penal Code sections 28155, 28205, 28215 and 28220 as the
22 authority that imposes a mandatory, ministerial duty on the DOJ to modify the DES in a way that
23 removes this alleged administrative and/or technological barrier. (SAC at ¶¶118 (d-e), 124-125.)
24 Petitioners do not allege any specific language in these statutes that establishes a mandatory,
25 ministerial duty rather than discretionary authority.

26 The Second cause of action seeks a writ of mandate commanding Respondents “to design,
27 implement, maintain and enforce updates to the DES such that it does not proscribe the lawful
28 sale, transfer and loan of an entire class of lawful firearms, including but not limited to rimfire

1 variants of the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms, and
2 barreled action firearms, and such that it comports with Penal Code sections 28155, 28205, 28215
3 and 28220.” (SAC at ¶127.)

4 The duplicative First and Eighth causes of action are requests for declaratory and injunctive
5 relief. The First cause of action rephrases the writ request (for the respondents to affirmatively
6 act to modify the DES) as a request for Respondents to stop enforcing the administrative and/or
7 technological barriers (i.e., not modifying the DES) that prevent sales of the Title 1 rimfire model
8 and the buntline revolver, butterfly grip and barreled action types of firearms. (SAC at ¶¶118-
9 119.) The Eighth cause of action rephrases the alleged failure to act to modify the DES as an act
10 constituting a rule resulting in a non-statutory ban on sales of these firearms. (SAC at ¶¶186-
11 187.) Petitioners allege that this rule constitutes an invalid underground regulation in violation of
12 the Administrative Procedure Act. (SAC at ¶192.)

13 **IV. Argument**

14 **A. A Demurrer Is an Appropriate Test of the Legal Sufficiency of the Second** 15 **Amended Complaint and Petition**

16 “Rules governing demurrers to civil complaints apply to mandamus actions.” (*Pinto Lake*
17 *MHP v. County of Santa Cruz* (2020) 56 Cal.App.5th 1006, 1012 [citing Civ. Proc., § 1109].) A
18 complaint is subject to demurrer on the ground that it does not state facts sufficient to constitute a
19 cause of action. (Code Civ. Proc., § 430.10.) For purpose of testing the sufficiency of a cause of
20 action, a demurrer admits material facts properly pleaded, “but not contentions, deductions or
21 conclusions of fact or law.” (*Adelman v. Associated Intern. Ins.* (2001) 90 Cal.App.4th 352, 359).

22 “If there is a reasonable possibility the defect can be cured the plaintiffs should be given
23 leave to amend. If there can be no liability as a matter of law the pleader should be given no
24 leave to amend.” (*Ramirez v. USAA Casualty* (1991) 234 Cal.App.3d 391, 397). The burden is
25 on plaintiff to show in what manner he can amend the complaint and how that amendment will
26 change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349).

27 “A proceeding in mandamus is generally subject to the general rules of pleading applicable
28 to civil actions.” (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271 [citation

1 omitted].) “Therefore, it is necessary for the petition to allege specific facts showing entitlement
2 to relief. If such facts are not alleged, the petition is subject to general demurrer or the court is
3 justified in denying the petition out of hand.” (*Id.* [citation omitted].)

4 **B. The Demurrer to the Second Cause of Action Should Be Sustained Without**
5 **Leave to Amend Because Petitioners Have Not, and Cannot, Allege**
6 **Sufficient Facts to Establish a Basis for a Writ of Mandate**

7 A traditional writ of mandate “seeks to enforce a mandatory and ministerial duty to act on
8 the part of an administrative agency or its officers.” (*The H.N. & Frances C. Berger Foundation*
9 *v. Perez* (2013) 218 Cal.App.4th 37, 46.) To obtain writ relief, “the petitioner must show there is
10 no other plain, speedy, and adequate remedy; the respondent has a clear, present, and ministerial
11 duty to act in a particular way; and the petitioner has a clear, present and beneficial right to
12 performance of that duty.” (*County of San Diego v. State of California* (2008) 164 Cal.App.4th
13 580, 593.) “Mandate will not issue if the duty is not plain or is mixed with discretionary power or
14 the exercise of judgment.” (*The H.N. & Frances C. Berger Foundation, supra*, 218 Cal.App.4th
15 at p. 46 [affirming sustaining of demurrer precluding mandamus relief].)

16 As discussed below, Petitioners have failed to allege sufficient facts: (1) establishing a
17 beneficial right or interest that confers standing, (2) establishing a ripe controversy or (3)
18 establishing a mandatory, ministerial duty for the DOJ to modify the DES.

19 **1. Petitioners Fail to Allege Sufficient Facts Establishing a Beneficial**
20 **Right as Required to Establish Standing to Pursue a Writ of Mandate**

21 A party that is not “beneficially interested” has no standing to seek relief in mandamus.
22 (*Yamada Brothers v. Agricultural Labor Relations Bd.* (1979) 99 Cal.App.3d 112, 125.)
23 “Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege
24 and establish standing lies with the plaintiff.” (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6
25 Cal.App.5th 802, 810 [citations omitted].) “The requirement that a petitioner be ‘beneficially
26 interested’ has been generally interpreted to mean that one may obtain the writ only if the person
27 has some special interest to be served or some particular right to be preserved or protected over
28 and above the interest held in common with the public at large.” (*SJJC Aviation Services, LLC v.*
City of San Jose (2017) 12 Cal.App.5th 1043, 1053 [citation omitted]; see *Embarcadero*

1 *Municipal Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 786-787
2 [affirmed sustaining of demurrer to petition for writ of mandate and complaint for declaratory and
3 injunctive relief because plaintiff did not have standing.] “The beneficial interest must be direct
4 and substantial.” (*SJJC Aviation Services, supra*, 12 Cal.App.5th at p. 1053 (citation omitted).)

5 “This standard is equivalent to the federal ‘injury in fact’ test, which requires a party to
6 prove by a preponderance of the evidence that it has suffered an invasion of a legally protected
7 interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or
8 hypothetical.” (*Id.* [citation omitted].) The beneficial interest standing requirement applies in
9 cases where declaratory and injunctive relief are sought as a remedy. (*Tobe v. City of Santa Ana*
10 (1995) 9 Cal.4th 1069, 1085.)

11 Here, Petitioners fail to allege sufficient facts to demonstrate they have standing. First,
12 Petitioners have failed to allege specific facts as to a particular model of a firearm that they are
13 unable to process through the DES. In this regard, Petitioners disregarded the Court’s order that,
14 “Petitioners must plead specific models to show standing” by adding to the SAC three categories
15 or types of firearms, not specific models: Buntline revolvers, butterfly grip firearms and barreled
16 action firearms. By failing to identify a specific model, Petitioners have clearly failed to allege
17 specific characteristics of a particular model that they have attempted to purchase and transfer
18 through the DES but could not due to characteristics of that model. As a result, Petitioners have
19 not established a deprivation of a direct and substantial beneficial interest as to the Buntline
20 revolver, butterfly grip and barreled action firearm types. Their claims as to these firearm types
21 are entirely conjectural and hypothetical.

22 The only specific model of firearm alleged in the SAC is the Title 1 rimfire model.
23 However, the SAC fails to allege any specific part or component of the Title 1 rimfire model
24 other than to state that it is a .17 WSM rimfire caliber. The SAC makes a general and conclusory
25 allegation that this firearm model is not a handgun, rifle or shotgun under California Law.
26 However, Petitioners fail to allege any specific component of the Title 1 rimfire model which
27 establishes why it is not a handgun, rifle or shotgun. Thus, there are no allegations establishing
28 that this model cannot be processed through the DES and Petitioners’ claims as to this model are

1 entirely conjectural and hypothetical. For these reasons, Petitioners have no standing.

2 Second, and equally important, Petitioners do not have standing because the SAC does not
3 allege that anyone actually attempted to purchase, sell or transfer a Title 1 rimfire model or any
4 firearm in the Buntline revolver, butterfly grip or barreled action categories. The SAC fails to
5 allege any specific purchase or transfer of any firearm that a dealer attempted to or could not
6 process in the DES. Petitioners added new paragraphs to the SAC purporting to address these
7 pleading deficiencies. (SAC at ¶¶99-102.) However, these general and conclusory allegations
8 fall far short of establishing an actual firearm transaction that could confer standing.

9 Specifically, the SAC alleges that Ryan Fellows, a member of the Association, “seeks to
10 acquire” a Title 1 rimfire model but is unable to do so because of defendants’ conduct. (SAC at
11 ¶99.) The SAC alleges that Beverly Epidendio, also an Association member, “seeks to acquire” a
12 buntline revolver but is prohibited from doing so because of defendants’ conduct. (SAC at ¶100.)
13 The SAC alleges that Coyote Point Armory, a licensed firearms dealer, “seeks to sell” a buntline
14 revolver and other lawful firearms including but not limited to the Title 1 rimfire model but is
15 prohibited from doing so due to defendants’ conduct. (SAC at ¶101.)

16 The SAC fails to allege that either of these individuals took any concrete action toward
17 actually purchasing a firearm, sending it to a dealer or going to a dealer to initiate processing of a
18 transfer in the DES. The SAC fails to allege that the dealer took any concrete action toward
19 actually selling a firearm or having a purchaser come to its store to initiate processing of a
20 transfer in the DES. There is no allegation that any dealer attempted to process any of these
21 firearms in the DES.

22 These allegations make clear that it is entirely conjectural and hypothetical to claim that a
23 particular firearm could not be processed through the DES. Moreover, without knowing the
24 circumstances of a hypothetical transaction and what specific firearm is involved, it is speculation
25 to assume how a gun dealer might interpret the category of the firearm, what efforts the gun
26 dealer might make to request an alternative process from the DOJ, and what the DOJ’s position
27 might be. For this additional reason, Petitioners have failed to allege sufficient facts to show
28 standing.

1 **2. Petitioners Fail to Allege Facts Establishing Public Interest Standing**

2 Public interest standing may be conferred “where the question is one of public right and the
3 object of the mandamus is to procure the enforcement of a public duty.” (*Save the Plastic Bag*
4 *Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.) In determining whether
5 public interest standing applies, the court considers three factors: first, whether “the public duty
6 is sharp and the public need weighty” (*SJJC Aviation* , *supra*, 12 Cal.App.5th at p. 1058); second,
7 whether the policy supporting public interest standing is outweighed by competing considerations
8 of a more urgent nature (*Reynolds v. City of Calistoga*, (2014) 223 Cal.App.4th 865, 873); and
9 third, whether the claim of public interest standing is driven by personal objectives rather than
10 broader public concerns. (*SJJC Aviation*, *supra*, 12 Cal.App.5th at 1057.)

11 Here, the Court, in its ruling sustaining the demurrer to the FAC, rejected Petitioners’
12 claim of public interest standing. The SAC merely repeats the allegations regarding public
13 interest from the FAC. (SAC at ¶¶91 [88 in the FAC], 94 [91 in the FAC], 126 [127 in the
14 FAC].) The SAC specifies only one model of a firearm, the Title 1 rimfire, made by one
15 manufacturer, Franklin Armory. The SAC identifies one person and one dealer who seek to
16 acquire or sell this weapon. These allegations fall far short of invoking a sharp public duty or
17 weighty public need and indicate that the claim of public interest standing is driven by
18 Petitioners’ personal objectives rather than broader public concerns. For these reasons,
19 Petitioners have not alleged sufficient facts to demonstrate that they have public interest standing.

20 **3. Petitioners Fail to Allege Facts Establishing a Ripe Controversy**

21 Whether an issue is ripe for adjudication applies to a petition for writ of mandate.
22 (*Monterey Coastkeeper v. Monterey County Water Resources Agency* (2017) 18 Cal.App.5th 1,
23 20 [affirming order denying petition for writ of mandate due to a lack of ripeness].)

24 “The concept of justiciability involves the intertwined criteria of standing and ripeness.”
25 (*Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1182.) “The
26 doctrine of ripeness is logically related to the concept of standing and therefore to the concept of
27 beneficial interest.” (*New York Times Co. v. Superior Court* (1990) 51 Cal.3d 453, 466.)

28

1 In addition, in order to satisfy the actual controversy requirement to obtain declaratory relief, the
2 alleged controversy must be ripe. (*Environmental Defense Project of Sierra County v. County of*
3 *Sierra* (2008) 158 Cal.App.4th 877, 885.) In *Monterey Coastkeeper*, the court stated:

4 The ripeness doctrine is primarily bottomed on the recognition that judicial
5 decision making is best conducted in the context of an actual set of facts so that the
6 issues will be framed with sufficient definiteness to enable the court to make a
7 decree finally disposing of the controversy. Thus, the ripeness requirement
8 prevents courts from issuing purely advisory or hypothetical opinions.

9 (*Monterey Coastkeeper, supra*, 18 Cal.App.5th at p. 20; see also *San Bernardino Public*
10 *Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1226–1227 [reversing the grant
11 of a writ petition for lack of ripeness finding that the trial court issued an advisory opinion].)

12 “The controversy must be definite and concrete, touching the legal relations of parties
13 having adverse legal interests. It must be a real and substantial controversy admitting of specific
14 relief through a decree of a conclusive character, as distinguished from an opinion advising what
15 the law would be upon a hypothetical set of facts.” (*Pacific Legal Foundation, supra*, 33 Cal.3d
16 at pp. 170-171.)

17 Here, the above discussion regarding standing also shows that the issues alleged in the SAC
18 are not ripe for adjudication. Petitioners have alleged no specific firearm or specific
19 characteristics of the Title 1 rimfire model establishing these are firearms that cannot be
20 processed in the DES. In addition, there are no allegations that anyone actually attempted to
21 purchase, sell or transfer a firearm or that a dealer attempted to and could not process one of these
22 firearms in the DES. Therefore, there is not a definite and concrete controversy sufficiently
23 alleged in the SAC. Under the generalized and conclusory facts alleged, Petitioners are seeking a
24 purely advisory and hypothetical opinion, which is precluded under the ripeness doctrine.

25 **4. Petitioners Fail to Allege Sufficient Facts Establishing a Mandatory, 26 Ministerial Duty for the DOJ to Modify the DES**

27 Petitioners assert that Penal Code sections 28155, 28205, 28215 and 28220 establish a
28 mandatory, ministerial duty to modify the DES.

“In order to construe a statute as imposing a mandatory duty, the mandatory nature of the
duty must be phrased in explicit and forceful language.” (*The H.N. & Frances C. Berger*

1 *Foundation, supra*, 218 Cal.App.4th at p. 48.) “Generally, mandamus may only be employed to
2 compel the performance of a duty that is *purely ministerial* in character. Mandate will not issue if
3 the duty is not plain or is *mixed with discretionary power* or the exercise of judgment.” (*Mooney*
4 *v. Garcia* (2012) 207 Cal.App.4th 229, 232-233 [emphasis in original, citation omitted].)

5 “A ministerial act is an act that a public officer is required to perform in a prescribed
6 manner in obedience to the mandate of legal authority and without regard to his or her own
7 judgment or opinion concerning such act’s propriety or impropriety, when a given state of facts
8 exists.” (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197
9 Cal.App.4th 693, 700.) Thus, language in a statute must specify a ministerial duty to act in a
10 particular way. (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593.)

11 “It is not enough that some statute contains mandatory language.” (*In re Groundwater*
12 *Cases* (2007) 154 Cal.App.4th 659, 689 [citation omitted]; see *State of California ex rel. Dept. of*
13 *Rehabilitation v. Superior Court*, (1982) 137 Cal.App.3d 282, 286-287 [holding that language
14 providing “it shall be the duty of the Attorney General to see that the laws of the State are
15 uniformly and adequately enforced” that was modified by discretionary language before it did not
16 impose a mandatory duty on the Attorney General to decide how to enforce the laws].)

17 Here, none of the Penal Code sections relied upon by Petitioners specify that the DOJ must
18 act in any particular way in setting up and operating the DES. Penal Code section 28205
19 addresses the methods by which dealers submit firearm purchaser information to the DOJ. The
20 applicable subdivision of this section is subdivision (c), which states:

21 On or after January 1, 2003, *except as permitted by the department*, electronic
22 transfer shall be the exclusive means by which information is transmitted to the
23 department. Telephonic transfer shall not be permitted for information regarding
sales of any firearms.

24 (Pen. Code, § 28205, subd. (c) [emphasis added].)

25 As in *State of California ex rel. Dept. of Rehabilitation*, the language “except as permitted
26 by the department” modifies the phrase that follows, “electronic transfer shall be the exclusive
27 means by which information is transmitted to the department.” This is clearly discretionary
28 language that does not impose any duty on the DOJ. This statute does not specify how the DES

1 should be set up or operated. Instead, it provides the DOJ with discretion to utilize the DES or
2 another method.

3 This discretionary authority is further demonstrated by Penal Code section 28155, which
4 states that “the Department of Justice shall prescribe the form of the register and the record of
5 electronic transfer pursuant to Section 28105.” (Pen. Code, § 28155.) The “record of electronic
6 transfer” is the information entered into the DES. (See Pen. Code, § 28100, subd. (a) [“As
7 required by the Department of Justice, every dealer shall keep a register or record of electronic or
8 telephonic transfer in which shall be entered the information prescribed in Article 2 (commencing
9 with Section 28150)”].)³ This section clearly confers discretionary authority upon the DOJ to
10 prescribe the format of the DES, including the information to be submitted.

11 Penal Code sections 28215 and 28220 clearly do not contain provisions imposing any
12 duty relative to the set-up and operation of the DES. Penal Code section 28215 merely describes
13 what the dealer and applicant are supposed to do in submitting an application for approval of a
14 firearm transaction. For example, the dealer must require the purchaser to sign the record of
15 transfer and the dealer signs as a witness to the signature and identification of the purchaser.
16 (Pen. Code, § 28215, subd. (a).) Penal Code section 28220 sets out procedures to follow upon
17 submission of firearm purchaser information to the DOJ including examination of records
18 pertaining to a purchaser and submission of information to a dealer relating to whether the
19 purchaser is prohibited from receiving a firearm.

20 Thus, these four statutes show that the DOJ has discretionary authority to set up and operate
21 the DES. Petitioners have not, and cannot, identify a statute that requires that the DOJ act in a
22 particular way regarding the set-up and operation of the DES. Therefore, there is no statutory
23 basis establishing a mandatory, ministerial duty to modify the DES.

24 “Mandamus does not lie to compel a public agency to exercise discretionary powers in a
25 particular manner, only to compel it to exercise its discretion in some manner.” (*AIDS*
26 *Healthcare Foundation, supra*, 197 Cal.App.4th at pp. 700-701.) *AIDS Healthcare Foundation*

27 _____
28 ³ The “register” is the Dealer Record of Sale in paper format. (See Pen. Code, §§ 28100,
subd. (a), 28210, subd. (d).)

1 did not involve a failure to act by the respondent but rather the petitioner’s contention that the
2 respondent should act in a different manner. (*Id.* at p. 704-705.) Under this scenario, the *AIDS*
3 *Healthcare Foundation* court held that it could not compel the respondent to do so. (*Id.* at p. 705
4 [demurrer properly sustained].)

5 Here, the DOJ has acted, pursuant to its discretionary authority, to set-up and operate the
6 DES. Petitioners request the court to order the DOJ to set-up and operate the DES in a different
7 manner. *AIDS Healthcare Foundation* dictates that this request is not an appropriate basis for
8 mandamus relief. For the foregoing reasons, the Demurrer to the writ of mandate cause of action
9 should be sustained without leave to amend.

10 **C. The Demurrer to the First and Eighth Causes of Action Should Be**
11 **Sustained Without Leave to Amend Because Requests for Declaratory and**
12 **Injunctive Relief are Types of Remedies and Not Independent Causes of**
Action

13 Requests for declaratory and injunctive relief are not independent causes of action but
14 merely types of remedies. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65,
15 82, disapproved on another ground in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613,
16 626; see also *Mesa Shopping Center-East, LLC v. O Hill* (2014) 232 Cal.App.4th 890, 901; *A.B.*
17 *Concrete Coating Inc. v. Wells Fargo Bank, National Association* (E.D. Cal., 2020) --- F.Supp.3d
18 ---, 2020 WL 5820613, at *6 [Applying California law, granted motion to dismiss claims for
19 declaratory and injunctive relief].) Declaratory and injunctive relief are remedies that are
20 potentially available if a plaintiff prevails on an underlying substantive cause of action. (*Id.*)

21 In *Coachella Valley Unified School Dist. v. State of California*, (2009) 176 Cal.App.4th 93,
22 the plaintiffs pursued a cause of action for a writ of mandate and declaratory relief. The
23 declaratory relief cause of action, as here, was based on the same underlying facts alleged in
24 support of the writ petition. (*Id.* at p. 125.) The *Coachella Valley Unified School Dist.* court
25 affirmed the trial court’s granting of judgment on the pleadings and dismissal of the declaratory
26 relief cause of action finding that, as between the parties, the trial court had before it one lawsuit
27 seeking different remedies on the same underlying issue. “On this issue, the complaint did not
28 state separate causes of action; rather, it asked for different forms of relief. In framing the

1 existence of a cause of action, California subscribes to the primary rights theory. Thus, the
2 invasion of one primary right gives rise to but a single cause of action.” (*Id.* at p. 125-126.)

3 Therefore, since declaratory and injunctive remedies are not independent causes of action,
4 the demurrer to the First and Eighth causes of action should be sustained without leave to amend.⁴

5 Even assuming arguendo that the requests for declaratory and injunctive relief could be
6 construed as causes of action, Petitioners fail to allege sufficient facts establishing a beneficial
7 right of interest that confers standing, a ripe controversy, or a mandatory, ministerial duty for the
8 DOJ to modify the DES. (See *California Department of Consumer Affairs v. Superior Court*
9 (2016) 245 Cal.App.4th 256, 263 [holding that claims were “too conjectural” to establish standing
10 to pursue declaratory relief].) The First and Eighth causes of action fail on this additional ground.

11 **D. The Demurrer to the Eighth Cause of Action Should Be Sustained Without**
12 **Leave to Amend Because, As a Matter of Law, the Configuration of the**
13 **DES Is Not a “Regulation” Governed by the Administrative Procedure Act**

14 Petitioners contend that the configuration of the DES is a “regulation” subject to the
15 Administrative Procedure Act (APA). (SAC ¶¶ 186-190.) This claim is meritless.

16 “The APA establishes the procedures by which state agencies may adopt regulations.”
17 (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.) “The APA provides
18 that ‘[n]o state agency shall issue, utilize, enforce, or attempt to enforce ... a regulation’ without
19 complying with the APA’s notice and comment provisions (Gov. Code, § 11340.5, subd. (a).)”
20 (*Id.* at p. 570 [italics omitted].) The APA defines “regulation” as “every rule, regulation, order, or
21 standard of general application or the amendment, supplement, or revision of any rule, regulation,
22 order, or standard adopted by any state agency to implement, interpret, or make specific the law
23 enforced or administered by it or to govern its procedure.” (Gov. Code, § 11342.600.)

24 The configuration of the DES is not a regulation as defined under the APA. The DES is an

25 ⁴ A demurrer, as opposed to a motion to strike, is the appropriate procedural tool to utilize
26 in this situation. First, in *Coachella Valley Unified School Dist.*, the trial court disposed of the
27 declaratory relief cause of action by way of a motion for judgment on the pleadings. (*Coachella*
28 *Valley Unified School Dist.*, *supra*, 176 Cal.App.4th at p. 112.) Second, a demurrer is appropriate
to address an entire cause of action. (Code Civ. Proc., § 430.50.) By contrast, motions to strike
are used to reach defects to pleadings not challengeable by demurrer such as cutting out
“irrelevant, false or improper” matters. (Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter
Group 2021), §§ 7:156, 7:177 [quoting Civ. Proc., § 436(a)].)

1 electronic web-based system that the DOJ uses to receive and process information submitted
2 regarding firearm transfers. (SAC at ¶¶53-54.) The configuration of the DES is not a “rule,”
3 “regulation,” “order” or “standard,” as those terms are used in Government Code section
4 11342.600. No court has determined that any similar web-based system or program constitutes a
5 “regulation” subject to the APA. Moreover, the configuration of the DES does not result in any
6 specific interpretation of law or legal determination being imposed with respect to a purchaser or
7 other applicant or to a firearm.

8 In addition, the DES is in essence a web-based form used by firearm dealers to submit
9 information to the DOJ. As a result, the DES cannot be a “regulation” subject to the APA
10 pursuant to Government Code section 11340.9, which provides, in relevant part, “[t]his chapter
11 does not apply to any of the following: . . . (c) A form prescribed by a state agency or any
12 instructions relating to the use of the form, but this provision is not a limitation on any
13 requirement that a regulation be adopted pursuant to this chapter when one is needed to
14 implement the law under which the form is issued.”

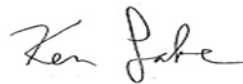
15 Because Petitioners cannot properly allege Respondents promulgated a regulation based on
16 the way in which the DES has been configured and processes firearm transfer applications, this
17 Court should sustain this Demurrer to Petitioners’ Eighth cause of action.

18 **V. Conclusion**

19 For the reasons set forth above, Respondents respectfully request that the Court sustain this
20 Demurrer to the First, Second and Eighth causes of action in the SAC without leave to amend.

21 Dated: March 23, 2021

Respectfully Submitted,

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23 

24 KENNETH G. LAKE
25 Deputy Attorney General
26 *Attorneys for Defendants and Respondents*
27 *State of California, acting by and through*
28 *the California Department of Justice and*
Former Attorney General Xavier Becerra

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

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

I declare: I am employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 300 South Spring Street, Room 1700, Los Angeles, California 90013. On March 23, 2021 I served the documents named below on the parties in this action as follows:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE
DEMURRER TO THE FIRST, SECOND AND EIGHTH CAUSES OF ACTION TO
THE SECOND AMENDED COMPLAINT AND PETITION**

Anna M. Barvir
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(BY MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Los Angeles, California. I am readily familiar with the practice of the Office of the Attorney General for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

(BY OVERNIGHT DELIVERY) I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery with the GOLDEN STATE OVERNIGHT courier service.

(BY FACSIMILE) I caused to be transmitted the documents(s) described herein via fax number.

(BY ELECTRONIC MAIL) I caused to be transmitted the documents(s) described herein via electronic mail to the email address(es) listed on the attached service list.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(FEDERAL) I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on March 23, 2021, at Los Angeles, California.

Sandra Dominguez
Declarant

/s/ Sandra Dominguez
Signature