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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**  
20 **JUSTICE, XAVIER BECERRA, IN HIS**  
21 **OFFICIAL CAPACITY AS ATTORNEY GENERAL**  
**FOR THE STATE OF CALIFORNIA, AND DOES**  
**1-10,**

22 Respondents-Defendants.  
23

Case No. 20STCP01747

**REPLY TO OPPOSITION TO 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**

24 Petitioners improperly refer to the specific pleading requirements for a writ of mandate  
25 cause of action as "minimal." In a proceeding in mandamus, "it is necessary for the petition to  
26 allege specific facts showing entitlement to relief." (*Chapman v. Superior Court* (2005) 130  
27 Cal.App.4th 261, 271.) If such facts are not alleged, the petition is subject to demurrer. (*Id.*; see  
28 also *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802 [every fact essential

1 to the existence of liability against a public entity must be pled with particularity].)

2       Petitioners also incorrectly assert that the standing requirement under California law is "less  
3 rigid" than under Federal law, citing *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241.

4 The *Weatherford* court only noted that the standing analysis under California law "differs  
5 somewhat" from a standing analysis in federal courts because the federal Constitution contains an  
6 independent jurisdictional limitation not contained in the California Constitution. (*Id.* at pp.

7 1247-1248.) However, the *Weatherford* court made clear that, under California law, in order to  
8 establish standing, a party is required to show that he or she is sufficiently interested as a  
9 threshold prerequisite to deciding a claim on the merits. (*Id.* at p. 1247.)

10 **Petitioners Fail to Allege Sufficient Facts to Establish Private or Public Interest Standing**

11       Petitioners submit in their opposition that they can establish a beneficial interest merely by  
12 referencing three categories of firearms and the Title 1, label them undefined subtype firearms,  
13 and then assert the conclusory, presumptive allegation that such firearms cannot be processed  
14 through the DES.

15       As discussed in the moving papers, this conclusory allegation is based on Petitioners'  
16 assumption that these so-called "undefined subtype" firearms do not fit squarely within the  
17 statutory definition of a rifle or shotgun and therefore a dealer would be unable to process a  
18 transfer in the DES of these weapons because the DES subtype menu only has options for rifle,  
19 shotgun or rifle-shotgun combinations. (Second Amended Complaint (SAC), ¶¶ 58-59.) It is this  
20 alleged issue with the subtype menu that petitioners refer to as an administrative or technological  
21 barrier that prevents sales of these weapons. (SAC, §§ 63, 64, 119.)

22       However, this assumption is undercut by Petitioners' statements in the Second Amended  
23 Complaint that these undefined subtype weapons have been manufactured for decades and have  
24 been known to the Department of Justice (DOJ) for at least 10 years. (SAC, ¶ 29.) A logical  
25 inference from these statements is that if dealers could not process transactions for these firearms  
26 over the years, there would be a plethora of examples of this occurring. However, Petitioners fail  
27 to allege any specific instance over the many years where any such weapon could not, according  
28 to Petitioners, be processed through the DES.

1           This discussion illustrates the importance of the requirement for pleading specific facts in  
2 order to establish standing. For example, it is necessary for Petitioners to specify a specific  
3 model and the specific characteristics of that model to explain why such a model could never be  
4 processed through the DES. The logical inference from the existence of these so-called  
5 “undefined subtype” weapons over the years is that dealers, depending of the specific  
6 characteristics of the model at issue, have determined on their own that a particular firearm that is  
7 not technically a rifle or shotgun under the statutory definition can be processed in the subtype  
8 menu as a rifle, shotgun or combination.

9           Notably, the applicable regulation, 11 CCR §4210, requires dealers to agree that all  
10 information submitted through the DES shall be "true, accurate, and complete *to the best of my*  
11 *knowledge.*" (Cal. Code Regs., tit. 11, § 4210, subd. (a)(6) [emphasis added].) Since there is no  
12 statutory requirement specifying that a submenu selection in the DES must match the statutory  
13 definition, depending on the particular weapon model, a dealer could believe that accurately  
14 selecting the closest subtype menu option that applies would not be submitting inaccurate  
15 information to the best of his knowledge. A dealer's agreement under this regulation is not under  
16 penalty of perjury so Petitioners assertion of criminal prosecution is unfounded.

17           Furthermore, as noted in Respondents’ moving papers, the DOJ has discretion in how it sets  
18 up and operates the DES. As noted by Petitioners in the SAC, the subtype menu in the DES is  
19 not mandated by statute. (SAC, ¶ 45.) It logically follows that the DOJ has discretion in how a  
20 particular firearm might be classified in the subtype menu.

21           The above discussion makes clear that it is entirely conjectural and hypothetical to claim  
22 that a particular firearm could not be processed through the DES. Petitioners’ asserted fear of  
23 submitting what could possibly be construed as an "improper" application does not excuse the  
24 requirement that, in order to establish standing, someone must have actually attempted to transfer  
25 through a dealer a Title 1 rimfire model or any firearm in the Buntline revolver, butterfly grip or  
26 barreled action categories. Without taking concrete, rather than hypothetical, steps to complete a  
27 transaction, it is speculation to assume how a gun dealer might interpret the category of the  
28

1 firearm, what efforts the gun dealer might make to request a clarification or alternative from DOJ,  
2 or what the DOJ's position as to a particular model might be.

3 The illegality of the Title 1 *centerfire* model poses no impediment to pursuing a purchase  
4 and transfer at a dealer of a Title 1 *rimfire* model. Petitioners repeatedly and improperly continue  
5 to group the Title 1 centerfire model and Title 1 rimfire model together. However, the Title 1  
6 rimfire model was not even alleged in the First Amended Complaint. The logical presumption is  
7 that Franklin Armory created the Title 1 rimfire model in response to the legislative amendments  
8 in 2020 that rendered the Title 1 centerfire an illegal assault weapon. This statutory amendment  
9 was limited to centerfire, not rimfire, firearms. Petitioners fail to allege when the Title 1 rimfire  
10 model came into existence. Nevertheless, it is clearly a relatively new model of a weapon that is  
11 substantially different from the Title 1 centerfire model because one is an illegal assault weapon  
12 and the other, according to Petitioners, is perfectly legal.

13 Petitioners could have rectified this deficiency after the filing of this demurrer by having an  
14 Association member purchase a Title 1 rimfire model, send it to a California dealer and appear at  
15 the dealer's location to request processing of a transfer in the DES. If the dealer indicated it could  
16 not process the weapon in the DES, Petitioners could have then requested leave to amend to add  
17 this rejection to support the standing requirement. However, it is possible that Petitioners did not  
18 take such action because the Title 1 firearm, both the centerfire and rimfire models, have been  
19 removed from the Franklin Armory website.<sup>1</sup>

20 Petitioners improperly assert a futility exception to the standing requirement. No such  
21 exception to the standing requirement exists. The futility exception relates to pre-litigation  
22 exhaustion of administrative remedies as a prerequisite to filing suit. For example, *Doster v. City*  
23 *of San Diego*, (1988) 203 Cal.App. 3d 257, cited by Petitioners, is an exhaustion of administrative  
24 remedies case.

25 The only exception to the requirement to establish private interest standing is to establish  
26 public interest standing. Where a plaintiff cannot satisfy the over and above test for private

27 <sup>1</sup> It is unclear why Petitioners have not informed the court of this removal because a  
28 request for an order to modify the DES to accommodate sales of a firearm that is no longer  
offered for sale is moot.

1 interest standing, California cases have still treated a plaintiff as beneficially interested for  
2 purposes of mandamus standing if the plaintiff satisfies the criteria for public interest  
3 standing. (Asimow, et al., Administrative Law (Rutter Grp. 2018), Ch. 14, § 14:5.)

4 As discussed in Respondents' moving papers, petitioners fall far short of alleging facts that  
5 demonstrate public interest standing. This case involves one manufacturer, two individuals and  
6 one dealer voicing a desire of their personal objectives. No broader public concern is implicated  
7 at all. This conclusion is further bolstered by the fact that, despite decades of the manufacturing  
8 of so-called "undefined subtype" firearms, Petitioners do not cite any specific instance of a  
9 rejected firearms transfer.

10 **The Statutes Relied upon by Petitioners Fail to Establish a Mandatory, Ministerial Duty for**  
11 **the Department of Justice to Modify the DES**

12 In their opposition, Petitioners concede, as they must, that the statutory provisions they rely  
13 upon as establishing a mandatory, ministerial duty to modify the DES in a particular way actually  
14 confer discretion authority upon the DOJ. Petitioners have now backtracked from their request in  
15 the SAC that the Court issue an order requiring specific modification of the DES to assert a  
16 general "ministerial duty that the DOJ maintain the DES so that all legal firearms may be  
17 transferred through the system." (Pltf. Opp., p. 15:14-16.) However, this is clearly an incorrect  
18 statement of the legal requirements for obtaining mandamus relief.

19 "In order to construe a statute as imposing a mandatory duty, the mandatory nature of the  
20 duty must be phrased in explicit and forceful language." (*The H.N. & Frances C. Berger*  
21 *Foundation* (2013) 218 Cal.App.4th 37, 48.) A ministerial act is an act that a public officer is  
22 "required to perform in a prescribed manner." (*AIDS Healthcare Foundation v. Los Angeles*  
23 *County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700 [emphasis added].) Thus,  
24 language in a statute must specify a ministerial duty *to act in a particular way*. (*County of San*  
25 *Diego v. State of California* (2008) 164 Cal.App.4th 580, 593 [emphasis added].)

26 Clearly, none of the Penal Code sections relied upon by Petitioners specify that the DOJ  
27 must act in any particular way in setting up and operating the DES. Notably, in their opposition  
28 Petitioners rely most heavily on Penal Code section 28160 as a basis for a mandatory duty, but

1 that section is not even identified in the SAC as a basis for any mandatory duty. Petitioners rely  
2 on section 28160 because it requires the DES to include gun type. However, Petitioners concede  
3 in the SAC that the DES includes an entry for gun type (SAC, ¶ 58) and that the inclusion of a  
4 subtype menu entry is not required by section 28160 (SAC, ¶ 45). Petitioners also argue that  
5 because section 28160 begins with the phrase “For all firearms” it imposes a mandatory duty on  
6 the DOJ to make the DES accommodate all firearms. This does not impose any duty on the DOJ,  
7 let alone a mandatory, ministerial duty. Section 28160 does not even refer to the DOJ or require  
8 any action by the DOJ.

9 Furthermore, the reference to “all firearms” in section 28160 does not imply that there must  
10 be DROS information for each and every firearm. To the contrary, the phrase “all firearms”  
11 conveys that the same DROS information is required for both “handguns” and “firearms other  
12 than handguns,” which had not been the case prior to January 1, 2014. In 2010, the information  
13 required to be submitted was set forth in Penal Code section 12077: subdivision (b) specified the  
14 information to be submitted for “handguns” while subdivision (c) specified the information to be  
15 submitted for “firearms other than handguns.” (Pen. Code, § 12077, subs. (b),(c) (2010).) Penal  
16 Code section 12077 was repealed as of January 1, 2012, and two separate sections were enacted  
17 in its place: Penal Code section 28160 applied only to “handguns” and Penal Code section 28165  
18 applied to “firearms other than handguns.” (Pen. Code, §§ 28160, subd. (a), 28165, subd. (a)  
19 (2010).) The Legislature then decided to require the same information for both “handguns” and  
20 “firearms other than handguns,” as was reflected in the 2012 version of section 28160, which  
21 provided, in relevant part: “Until January 1, 2014, for handguns, and thereafter for all firearms,  
22 the register or record of electronic transfer shall include all of the following information: . . .”<sup>2</sup>  
23 (Pen. Code, §28160, subd. (a) (2012).) Thus, the phrase “all firearms” was used to convey that  
24 the same information was required for “handguns” and “firearms other than handguns.”  
25 In sum, section 28160 does not impose any mandatory, ministerial duty on the DOJ.

26 As discussed in Respondents’ moving papers, the statutes upon which Petitioners rely  
27 actually provide the DOJ with discretion. While conceding this point, Petitioners incorrectly

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28 <sup>2</sup> Section 28165 was repealed effective January 1, 2014.

1 assert that an exercise of significant discretion is required citing *Mooney v. Garcia* (2012) 207  
2 Cal.App.4th 229. (Plft. Opp., p. 16.) However, Petitioners omit a key portion of the sentence they  
3 rely upon. The full sentence states: “*Even if mandatory language appears in the statute creating*  
4 *a duty*, the duty is discretionary if the entity must exercise significant discretion to perform the  
5 duty.” (*Id.* at p. 233 [emphasis added as to language omitted by Petitioners].)

6 Read as a whole, this citation from *Mooney* clearly means that, even where mandatory  
7 statutory language creates a duty to act in a particular way, the duty is still discretionary if the  
8 entity must exercise significant discretion to perform the duty. In other words, an inquiry  
9 regarding significant discretion does not come into play unless a mandatory, ministerial duty to  
10 act in a particular way is established. In *Mooney*, the court affirmed the denial of a petition for  
11 writ of mandate finding that the statute at issue provided “some level of discretion” and therefore  
12 the statute provided for the exercise of discretion rather than mandating a ministerial act. Thus,  
13 the *Mooney* court did not analyze whether there was an exercise of significant discretion. (*Id.* at  
14 p. 234.)

15 Furthermore, Petitioners cite *California Correctional Supervisors Organization, Inc. v.*  
16 *Department of Corrections*, (2002) 96 Cal.App.4th 824, in an attempt to avoid the clear authority  
17 of the Second District Court of Appeal opinion in *AIDS Healthcare Foundation v. Los Angeles*  
18 *County Dept. of Public Health*, (2011) 197 Cal.App.4th 693, that mandamus does not lie to  
19 compel a public agency to exercise discretionary powers in a particular manner or based on a  
20 respondent's belief that the respondent should act in a different manner. (*Id.* at pp. 704-705.)

21 The *AIDS Healthcare Foundation* opinion cites *California Correctional Supervisors*  
22 *Organization* stating: “To compel the Department to take some action the Foundation must plead  
23 and prove the Department has failed to act, and its failure to act is arbitrary, beyond the bounds of  
24 reason, or in derogation of the applicable legal standards.” (*Id.* at p. 704 [citing *California*  
25 *Correctional Supervisors Organization, supra*, 96 Cal.App.4th at p. 827].) The SAC contains no  
26 such allegations providing a further basis for sustaining the demurrer.

27 Nevertheless, the *AIDS Healthcare Foundation* court's inquiry as to an abuse of discretion  
28 was limited to a failure to act. (*Id.* at p. 704.) Once the court determined that the respondent did

1 not fail to take any action in conformity with its statutory authority, it held that it could not  
2 compel the respondent to exercise its discretion in a particular manner. Thus, the petition failed  
3 to state a cause of action. (*Id.* at p. 704-705.) To the extent *Correctional Supervisors*  
4 *Organization*, a Third District opinion, can be construed as inconsistent with this holding or  
5 having any application to this case, it should be disregarded.

6 Here, the DOJ has not failed to act. Pursuant to its discretionary authority, it has acted to  
7 set-up and operate the DES. Petitioners request the court to order the DOJ to set-up and operate  
8 the DES in a different manner. *AIDS Healthcare Foundation* dictates that this request is not an  
9 appropriate basis for mandamus relief.

10 **Separate Causes of Action for Declaratory and Injunctive Relief are Improper**

11 California cases have consistently held that requests for declaratory and injunctive relief are  
12 not independent causes of action but types of remedies. In *Faunce v. Cate*, (2013) 222  
13 Cal.App.4th 166, the court sustained a demurrer to causes of action for injunctive and declaratory  
14 relief stating that, "injunctive and declaratory relief are equitable remedies, not causes of action.  
15 (*Id.* at 173.) The *Faunce* court held that the trial court properly sustained the demurrer as to these  
16 claims because they were wholly derivative of other nonviable causes of action. (*Id.*; *see also Batt*  
17 *v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82.)

18 Petitioners' recitation to Code of Civil Procedure section 1060 does not alter this  
19 conclusion. The court in *A.B. Concrete Coating v. Wells Fargo Bank*, (E.D. Cal. 2020) 491  
20 F.Supp.3d 727, quoted this section 1060 in its analysis and still concluded that, under California  
21 law, declaratory and injunctive relief are remedies, not an independent causes of action. (*Id.* at  
22 737.) Declaratory and injunctive relief are remedies that are potentially available if a plaintiff  
23 prevails on an underlying substantive cause of action. (*Id.* at 737-738.)

24 *Coachella Valley Unified School Dist. v. State of California*, (2009) 176 Cal.App.4th 93,  
25 is directly on point in that the trial court had before it one lawsuit seeking different remedies on  
26 the same underlying issue. "On this issue, *the complaint did not state separate causes of action;*  
27 *rather, it asked for different forms of relief.*" (*Id.* at p. 125 (emphasis added).)



1           The *Coachella Valley Unified* court noted that since it concluded there was no cause of  
2 action for a writ of mandate, there was no remedy for declaratory relief because "the declaratory  
3 relief claim derives solely from the allegations of the mandate claim." (*Id.* at p. 126.)

4           Thus, Petitioners claims for declaratory and injunctive relief rises or falls with their writ of  
5 mandate cause of action. Irrespective of the result as to the writ of mandate cause of action,  
6 separate causes of action for declaratory and injunctive remedies are not appropriate and therefore  
7 the demurrer to the First and Eighth causes of action should be sustained without leave to amend.

8           **The Configuration of the DES Is Not a "Regulation" Governed by the APA**

9           Petitioners contend that they are not alleging "that the configuration of DES itself  
10 constituted an underground regulation[.]" (Pltf. Opp., p. 20, lines 8-9.) But this is in fact what  
11 Plaintiffs allege in the SAC. The "rule" which Plaintiffs allege constitutes an impermissible  
12 underground regulation is described as "technological and administrative barriers" to the transfer  
13 of "undefined subtype" firearms. (SAC ¶186.) The only alleged "technological" or  
14 "administrative" barriers is the configuration of the DES. Removing any doubt, Plaintiffs also  
15 allege that "[t]he rule was created by DOJ for the purpose of submitting specific information to  
16 the DOJ and for processing registrations and background checks via the DES, a system  
17 administered by the DOJ pursuant to the Penal Code. It was created, implemented, maintained  
18 and/or not corrected by the DEFENDANTS for the purpose of preventing the lawful sale of  
19 products through the DES." (SAC, ¶ 188.) This clearly describes the configuration of the DES.

20           In any event, Plaintiffs' argument that they can seek relief under the APA based on an  
21 alleged "internal" rule held by the DOJ to generally prohibit the transfer of "undefined subtype"  
22 firearms is unavailing, because the only alleged manifestation or expression of this "internal" rule  
23 is the configuration of the DES. Plaintiffs' argument is also absurd, because the DOJ could not  
24 promulgate a regulation generally prohibiting the transfer of all "undefined subtype" firearms.

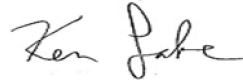
25           Finally, Plaintiffs fail to provide any viable argument that the DES should not be treated as  
26 a "form" exempt from the APA under Government Code section 11340.9, subdivision (c).  
27 Plaintiffs claim that "this case squares with Government Code section 11340.9, which clarifies  
28 that while the APA does not apply to all forms used by an agency, when a form is necessary to

1 implement the law under which the form is issued, as the DES is, it must be adopted under the  
2 requirements of the APA.” (Opp. at p. 20:17-20.) This blatantly mischaracterizes the statutory  
3 language. In fact, section 11340.9 does not require that any form be adopted under APA  
4 procedures. Instead, it provides that the exemption for forms “is not a limitation on any  
5 requirement that a regulation be adopted pursuant to this chapter when one is needed to  
6 implement the law under which the form is issued.” This only means that if a *regulation* is  
7 needed to implement the law, then the *regulation* should be promulgated according to APA  
8 procedures. It does not require that any *form* be adopted pursuant to APA procedures.

9 Dated: May 26, 2021

Respectfully Submitted,

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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 May 26, 2021, I served the documents named below on the parties in this action as follows:

**REPLY TO OPPOSITION TO THE DEMURRER TO THE FIRST, SECOND AND EIGHTH CAUSES OF ACTION TO THE SECOND AMENDED COMPLAINT AND PETITION**

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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 above.

(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 May 26, 2021, at Los Angeles, California.

Sandra Dominguez  
Declarant

/s/ Sandra Dominguez  
Signature