ROB BONTA
Attorney General of California
BENJAMIN BARNOUW (STATE BAR 168581)
Supervising Deputy Attorney General
KENNETH G. LAKE (STATE BAR 144313)
Deputy Attorney General
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 269-6506
Fax: (916) 731-2120
E-mail: Ben.Barnouw@doj.ca.gov

Exempt from filing fees pursuant to Government Code section 6103

Attorneys for Defendants and Respondents State of California, acting by and through the California Department of Justice, Former Attorney General Xavier Becerra in his personal capacity only and Attorney General Rob Bonta in his official capacity only

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

FRANKLIN ARMORY, INC. AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,

Petitioners-Plaintiffs,

v.

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

Respondents-Defendants.

Case No. 20STCP01747

REPLY BRIEF IN SUPPORT OF MOTION BY RESPONDENTS-DEFENDANTS TO DISMISS THE FIRST, SECOND AND EIGHTH CAUSES OF ACTION IN THE SECOND AMENDED COMPLAINT AND PETITION

Date: January 27, 2022
Time: 9:30 a.m.
Dept: 85

Honorable James C. Chalfant

INTRODUCTION

This lawsuit is about the configuration of the Dealer Record of Sale Entry System (DES), the electronic system utilized by respondent-defendant California Department of Justice (DOJ) to process applications for firearm transactions. Petitioners-plaintiffs Franklin Armory, Inc. (Franklin Armory) and the California Rifle & Pistol Association, Incorporated (Association) (collectively, Petitioners) are pursuing a Petition for Writ of Mandate and related claims for injunctive and declaratory relief based on allegations that they have been unable to process transactions involving "firearms with an undefined subtype," also sometimes referred to as "other" firearms, because the DES requires users to choose a firearm type and there is no "other" option. Petitioners refer to this situation as a "technological barrier."

As was demonstrated in the declarations supporting this Motion to Dismiss, the DOJ has removed this technological barrier by modifying the DES so that there is now an "other" option. As a result of the modification, Petitioners' claims for writ, injunctive and declaratory relief are now moot.

Petitioners do not dispute that the "other" option is now available in the DES. Nor do they dispute that this modification has resolved the alleged "technological barrier" upon which their claims are premised. However, Petitioners argue their claims are not moot because the parties' dispute is likely to recur. They specifically argue that the DOJ might reverse the modification it made to the DES. This argument is meritless. The modification to the DES involved substantial time and effort, and required modifications to not only the DES but to several other firearms applications and databases operated by the DOJ. More importantly, there is no reason whatsoever why the DOJ would want to reverse the modification.

Petitioners point out the DOJ contests that it had any legal duty to modify the DES. That is true, but that does not mean that the DOJ has any reason to reverse the modification.

Petitioners also discuss some of the parties' settlement communications and point out that the parties have not entered into an agreement to resolve Petitioners' claims for writ, injunctive and declaratory relief. This also does not demonstrate that the DOJ has any reason to reverse the modification. In addition, Petitioners' argument on this point ignores that the parties entered a

stipulation which specifically contemplated that the DOJ would file this Motion to Dismiss and that Petitioners would conduct discovery to develop grounds to oppose the motion.

In addition to their argument that the DOJ might reverse the modification of the DES, Petitioners argue their claims are not moot because the DOJ might issue a bulletin to firearms dealers that improperly restricts the use of the "other" option. This argument is also meritless. Again, there is no reason why the DOJ would want to improperly restrict firearms dealers in utilizing the "other" option. Petitioners focus on imprecise language in a bulletin issued by the DOJ to firearms dealers on September 27, 2021, but the DOJ promptly corrected the mistake by posting a revised bulletin three days later, before the DES modification was deployed. Notably, in addition to posting the revised bulletin, the DOJ has acknowledged that there was a mistake in the September 27 bulletin. Finally, the DOJ's issuance of bulletins to firearms dealers is beyond the scope of Petitioners' claims for writ, injunctive and declaratory relief.

In sum, the parties' dispute about whether the DOJ had a legal duty to modify the DES is not likely to recur. Having modified the DES and the other firearms applications and databases, there is no reason why the DOJ would want to undo the modifications.

ARGUMENT

I. PETITIONERS' CLAIMS PREMISED ON MODIFICATION OF THE DES ARE MOOT

A. The DOJ Has Modified the DES to Add an "Other" Option

As was demonstrated in the declarations supporting this motion, the DOJ has modified the DES to add an "other" option. Petitioners specifically suggested this modification in their Second Amended Complaint and Petition. (Second Amended Complaint and Petition [SAC] at p. 17, ¶64.) The modification was deployed on October 1, 2021. The Declaration of Cheryle Massaro-Florez demonstrates that considerable time and effort was put into modifying the DES and that modifications were made to several other applications and databases to account for the fact that firearms can now be designated as "other" in addition to the standard statutory definitions. (Declaration of Cheryle Massaro-Florez at pp. 3-6, ¶¶6-17.)

Petitioners do not dispute any of this evidence. Nor do they dispute that this modification of the DES has addressed the alleged "technological barrier" upon which their claims are premised.

B. The Parties' Dispute Is Not Likely to Recur

Petitioners argue that, even though their claims are moot, the Court can exercise its discretion to address their claims for writ, injunctive and declaratory relief under an exception that applies when the parties' dispute is likely to recur. (Opposition at p. 11, lines 1-5, and p. 16, lines 21-23; see *Liberty Mutual Insurance Company v. Fales* (1973) 8 Cal.3d 712, 715-716 ["If an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot."].)

Petitioners ask the Court to seek to invoke this exception based on their argument that the DOJ could, in theory, reverse the modifications it made to the DES and the related firearms applications and databases. However, Petitioners offer absolutely no reason why the DOJ would want to reverse the modifications it made, much less that it is likely the DOJ would do so. The modification to the DES involved substantial time and effort, and required modifications to several other applications and databases operated by the DOJ. (Declaration of Cheryle Massaro-Florez at pp. 3-6, ¶¶6-17.) While it is technologically possible for the DOJ to modify the DES again to remove the "other" option, there is no reason why the DOJ would want to undo the modifications it has already developed and deployed.

Petitioners allege that the DOJ purposefully delayed modifying the DES in 2020 so that Franklin Armory's centerfire "Title 1" could not be sold before it was designated by the legislature as a banned "assault weapon." (SAC at p. 24, ¶¶109-112.) Even if these allegations were true, however, they would not show that the DOJ has any motivation now to undo the modifications it made to the DES. This is because the centerfire "Title 1," as an "assault weapon," cannot be processed through the DES as a matter of law. The fact that the centerfire "Title 1" cannot be processed through the DES because it is an "assault weapon" was the basis for the DOJ's demurrer to the First Amendment Complaint and Petition, which was granted by the Court.

In sum, the parties' dispute whether the DOJ had a legal duty to modify the DES is not likely to recur. This is what distinguishes this case from the cases cited by Petitioners. In *Marin County Board of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 924, the issue was whether the

Board violated the law "by limiting its membership to persons primarily engaged in the real estate business and by denying nonmembers access to its multiple listing service." As the Court recognized, access to the multiple listing service was "the most important" benefit provided by the Board to its members. (*Ibid.*) On appeal, the Board argued the case was moot because, during the appeal, "the bylaw requiring that associate members be primarily engaged in the real estate business was deleted." (*Id.* at p. 928.) The Court rejected this argument because the Board still restricted access to the multiple listing service by nonmembers, and also because the Board could reinstate the by-law. (*Id.* at p. 929.) In that case, the Board had an ongoing incentive to restrict its membership in order to restrict access to its valuable asset, the multiple listing service.

In *County of Madera v. Gendron*, 59 Cal.2d 798, 800 (1963), the issue before the Court was "the constitutionality of Government Code section 28135 insofar as it prohibits the District Attorney of Madera County from engaging in the private practice of law and to determine, if he does so, whether the county may lawfully withhold his salary." The Court concluded the case was not mooted by the fact the District Attorney had lost his re-election bid and his successor had taken office. (*Id.* at pp. 803-804.) It was likely the dispute would recur because the constitutionality of a statute was at issue. Without a ruling on the constitutionality of the statute, the same or another county would not only have an incentive, but might be compelled, to invoke the Government Code section at issue if any District Attorney in the future engaged in private practice. (See *id.* at p. 804 ["the instant question affects the defendant's successors in office as well as the district attorneys of other counties"].)

Eye Dog Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal.2d 536, 540, also involved the constitutionality of a statute. In that case, the plaintiff's license had been suspended under the challenged statutory scheme because it had no licensed trainer, and the court considered whether the case became moot when the plaintiff's license was reinstated. The license was reinstated not because the defendant changed its interpretation of the statute or decided not to enforce the statute, but because the plaintiff hired a license trainer. (*Id.* at pp. 540-541.) Thus, the dispute was likely to recur; as the court noted "[t]here is also agreement between the parties that in the event of a dismissal for mootness plaintiff, in light of its past history in that regard, will

again find itself without a trainer; it will thus be relegated to the very situation which precipitated the present litigation[.]" (*Id.* at p. 542.) It appears the parties generally agreed the case was not moot. (See *id.* at p. 542 ["both sides agree that the instant judgment necessarily affects their rights in the future"].)

Finally, in *Cook v. Craig* (1976) 55 Cal.App.3d 773, 780, the court concluded the plaintiffs' Public Records Act claims were not rendered moot by the defendant's voluntary disclosure of a citizen complaint procedure, where it was not clear that the defendant had "provided all the information sought by plaintiffs." In addition, the court noted that "at least one plaintiff seeks to know what procedures were in effect prior to the December 1974 revision, under which his prior complaint was investigated, so the case as to him is not moot." (*Ibid.*) The court also added that "[a]s to future revisions of the procedures, it is apparent that defendant's unilateral decision to disclose its complaint investigation procedures is also unilaterally rescindable. Given the position of defendant that it has no legal obligation to disclose these procedures, and its voluntary disclosure only after litigation was commenced, we cannot say that the dispute will not recur." (*Ibid.*) Thus, although the court did not conclude it was "likely" the dispute would recur, it is apparent that the possibility the dispute might recur, combined with the fact that issues still remained to be decided, rendered the case not moot.[1]

In this case, there is no dispute that the DOJ has made modifications to the DES which resolve Petitioners' claims for writ, injunctive and declaratory relief. There is also no reason why the DOJ would want to reverse those modifications. Accordingly, Petitioners' claims are moot.

C. DOJ's Position that It Has No Duty to Modify the DES Is Irrelevant

Petitioners argue that their claims regarding the DES are somehow not moot because the DOJ continues to take the position that it had no legal duty to modify the DES. But the concept of

[1] In the other cases cited by Petitioners, the courts found the issues were moot. In *County of Los Angeles v. Davis* (1979) 440 U.S. 625, 631, the Court held under federal law that an issue in the case was moot because, in part, it was unlikely the defendant would engage in the challenged practice in the future. In *East Bay Mun. Util. Dist. v. Calif. Dept. of Forestry & Fire Protection*, (1996) 43 Cal.App.4th 1113, 1131-1132, the trial court declined to issue a declaratory judgment or grant injunctive relief on an issue because the dispute was not likely to recur, and the Court of Appeal affirmed. In *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479, the court concluded the case was moot.

mootness does not require that a party concede an issue; to the contrary, the concept is based on the idea that courts should not decide issues where there is no longer an actual controversy that requires the court's time and resources. A case is moot, and therefore not justiciable, where "'an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist.' [Citation]" (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573); see *TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 147-148 ["'No purpose would be served in directing the [respondent] to do what has already been done'"; quoting *State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 742].)

Petitioners also suggest that the DOJ's position that it had no legal duty to modify the DES equates to a position that it has "authority to block the lawful transfer of otherwise legal firearms." (Opposition at p. 13, lines 2-4; see *id.* at p. 16, lines 3-4 ["Nor has the DOJ ever conceded it was wrong to block the transfer of lawful firearms in the first place."].) But these are two different concepts. The DOJ has never taken the position that it has "authority to block" lawful transfers of firearms. This is fully consistent with the DOJ's position that it has no "ministerial duty" to modify the DES. (See *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593 [holding that for a party to obtain writ relief it must show the public entity "has a clear, present, and ministerial duty to act in a particular way"]; *The H.N. & Frances C. Berger Foundation v. Perez* (2013) 218 Cal.App.4th 37, 46 ["Mandate will not issue if the duty is not plain or is mixed with discretionary power or the exercise of judgment."].) The DOJ's position is that it has discretion in how to operate and modify the DES, which involve issues of resources and logistics. Notably, Petitioners' allegation that adding an "other" option to the DES required minimal effort (SAC at p. 18, ¶73) is contradicted by the evidence; in fact, adding the "other" option involved substantial time and resources and required modifications to other applications and databases (Declaration of Cheryle Massaro-Florez at pp. 3-6, ¶¶6-17).

Finally, none of these arguments by Petitioners shows that the DOJ has any reason or motivation to reverse the modifications it has made to the DES and other firearms applications and databases.

D. The Parties' Settlement Negotiations Are Irrelevant

Petitioners describe some the parties' settlement discussions and argue that these discussions are somehow relevant to the mootness issue. This argument is baseless. The parties' settlement discussions are not relevant. There are many reasons why one party may not accept settlement terms offered by another party. In any event, the DOJ's reluctance to agree to the terms proposed by Petitioners does not demonstrate that the DOJ has any reason to reverse the modifications it made to the DES and the other firearms applications and databases.

Furthermore, it is disingenuous for Petitioners to now argue that their claims are not moot based on the parties' settlement discussions when the parties' discussions resulted in a stipulation that the DOJ would file this Motion to Dismiss. As is set forth in that stipulation, submitted to the Court on November 19, 2021, the parties agreed that the DOJ would file this Motion to Dismiss and Petitioners indicated they would need to pursue discovery to support their opposition to the motion. (Request for Judicial Notice at pp. 49-50.) After the Motion to Dismiss was filed, the DOJ produced for deposition the two DOJ employees who provided declarations in support of the Motion to Dismiss for deposition. Surprisingly, the declaration submitted by Petitioners' counsel omits any mention of the parties' stipulation and Petitioners' insistence on conducting discovery.

II. PETITIONERS' CLAIMS PREMISED ON A BULLETIN ISSUED BY THE DOJ FAILS

A. Petitioners Have Not Shown the DOJ will Likely Issue Bulletins Improperly Restricting Use of the "Other" Option

Petitioners also argue that their claims are not moot because the DOJ could conceivably issue a bulletin improperly restricting firearms dealers from utilizing the "other" option. This theory fails because Petitioners offer no explanation why the DOJ would want to issue such a bulletin. Thus, there is no showing that the issue will recur in the future.

Petitioners have focused on the bulletin posted by the DOJ on September 27, 2021, but as the DOJ's motion and the supporting Declaration of Maricela Leyva indicate, that bulletin was imprecise due to a mistake. (Declaration of Maricela Leyva at pp. 3-4, ¶8.) Moreover, the DOJ quickly issued a revised bulletin that was published to firearms dealers on September 30, 2021, before the modification to the DES was deployed. (*Id.* at p. 4, ¶9, and Exh. "B.") Petitioners have

not made any argument that the revised bulletin is improper in any way.

There is no evidence that the imprecise language in the September 27, 2021, bulletin was anything other than a mistake, nor is there any evidence that this issue is likely to recur. There is also no evidence that the DOJ has any reason to improperly limit the use of the "other" option.

B. The DOJ's Issuance of Bulletins Is Beyond the Scope of this Lawsuit

Petitioners' petition for writ of mandate and the related claims for declaratory and injunctive relief do not address bulletins issued by the DOJ. Thus, it is unclear what type of relief related to the DOJ's use of bulletins Petitioners could obtain under their current claims.

Petitioners seek a writ of mandate "commanding DEFENDANTS to design, implement, maintain and enforce updates to the DES such that it does not proscribe the lawful sale, transfer and loan of an entire class of lawful firearms, including but not limited to rimfire variants of the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms, and such that it comports with Penal Code sections 28155, 28205, 28215 and 28220." (SAC at p. 29, ¶127.) This relief focuses solely on the configuration of the DES. In addition, the statutory sections that are cited all concern the configuration of the DES the process of submitting firearm transactions through the DES; none address DOJ bulletins or other guidance. (See Pen. Code, §§ 28155 [the DOJ "shall prescribe the form of the register and the record of electronic transfer"], 28205, subd. (c) [relating to how the dealer record of sale information is transmitted to the DOJ], 28215 [describing the roles of the dealer and applicant in submitting an application through the DES], 28220 [describing the DOJ's role after an application is submitted].)

Similarly, none of the declaratory relief sought by Petitioners in their First cause of action concerns bulletins. (See SAC at pp. 25-26, ¶118.) The same is true of the relief Petitioners seek in their Eighth cause of action. (SAC at p. 38, ¶192.)

Petitioners concede that their Second Amended Complaint and Petition does not mention bulletins, and that the DOJ "had issued no bulletin relevant to this action until September 27, 2021." (Opposition at p. 17, lines 15-17.) Petitioners argue, however, that "the SAC expressly seeks a declaration that the DES 'as designed, implemented, maintained *and/or enforced*' (SAC, at Prayer for Relief, ¶ 6.), is not in compliance with the relevant laws" and that bulletins are tools

for "enforcing" the DES. (Opposition at p. 17, lines 18-20.) But Petitioners selectively and misleadingly quote from the prayer for relief; the actual quote is as follows: "A declaration that the DES, as designed, implemented, maintained and/or enforced is not in compliance with the mandate imposed by Penal Code sections 11106, 28155, 28205, 28215 and 28220." (SAC at p. 42, item 6.) This specifically references Penal Code sections 28155, 28205, 28215 and 28220, which, as discussed above, govern the configuration of the DES and the process of submitting firearm transaction applications through the DES; it is unclear what relevance Penal Code section 11106 has to this case, as it only requires the DOJ to maintain information it receives through the DES. (See Pen. Code, § 11106, subd. (a)(1)(D) ["the Attorney General shall keep and properly file a complete record of all of the following: . . (D) Dealers' Records of Sale of firearms"].) In any event, none of these sections remotely concerns bulletins issued by the DOJ concerning the DES.

Petitioners also argue that "the complaint seeks equitable relief enjoining the DOJ from enforcing '*administrative* and/or technological barriers that prevent or otherwise inhibit the sale' of the firearms at issue. (SAC, at Prayer for Relief, ¶¶ 7-8.)" (Opposition at p. 17, lines 21-24.) Contrary to Petitioners' argument, however, a bulletin cannot be considered an "administrative barrier." In any case, Petitioners do not include any statutes or other law in their Second Amended Complaint and Petition that govern bulletins or guidance issued by the DOJ or show that Petitioners could be entitled to any relief with respect to the DOJ's use of bulletins.

CONCLUSION

The DOJ has modified the DES to add an "other" option. This modification involved substantial time and effort, and required modifications to several other firearms applications and databases. It has resolved Petitioners' allegations that the firearms at issue cannot be processed through the DES. There is no reason why the DOJ would reverse this modification, or why it

/ / /

/ / /

/ / /

would seek to improperly limit the use of this "other" option. Accordingly, Petitioners' First, Second and Eighth causes of action are moot and should be dismissed.

Dated: January 20, 2022

Respectfully Submitted,
ROB BONTA
Attorney General of California

Benjamin Barnouw

BENJAMIN BARNOUW
Supervising Deputy Attorney General
KENNETH G. LAKE
Deputy Attorney General
Attorneys for Defendants and Respondents State of California, acting by and through the California Department of Justice, Former Attorney General Xavier Becerra in his personal capacity only and Attorney General Rob Bonta in his official capacity only

DECLARATION OF SERVICE BY E-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 January 20, 2022, I served the attached **REPLY BRIEF IN SUPPORT OF MOTION BY RESPONDENTS DEFENDANTS TO DISMISS THE FIRST, SECOND AND EIGHTH CAUSES OF ACTION IN THE SECOND AMENDED COMPLAINT AND PETITION** by transmitting a true copy via electronic mail, addressed as follows:

Anna M. Barvir
Jason A. Davis .
Konstadinos T. Moros
MICHEL & ASSOCIATES, P.C.
E-mail addresses:
abarvir@michellawyers.com
Jason@calgunlawyers.com
kmoros@michellawyers.com
lpalmerin@michellawyers.com
Counsel for Plaintiffs-Petitioners

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 20, 2022, at Los Angeles, California.

Jasmine Zarate	/s/ Jasmine Zarate
Declarant	Signature

LA2020601064
64826497.docx