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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FRANKLIN ARMORY, INC., et al.,

Petitioners-Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF JUSTICE, et al.,

Respondents-Defendants.

Case No.: 20STCP01747

[Assigned for all purposes to the Honorable Daniel S. Murphy; Department 32]

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Hearing Date: September 6, 2023
Hearing Time: 8:30 a.m.
Department: 32
Judge: Hon. Daniel S. Murphy

Action filed: May 27, 2020

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INTRODUCTION

While an assortment of issues run through Defendants' motion for judgment on the pleadings, the motion presents one core question: Do the California Attorney General and Department of Justice have the authority to neglect—intentionally or otherwise—their duty to ensure that the systems they develop to facilitate the submission of firearm purchaser information do not act as barriers to the transfer of lawful firearms. The answer is, of course, no.

As the allegations in Plaintiffs' Second Amended Complaint ("SAC") make clear, Plaintiff Franklin Armory notified Defendants DOJ and former Attorney General Becerra that the firearms at issue in this litigation could not be transferred through the DROS Entry System ("DES") because of defects in that system. Franklin Armory suggested that the DOJ make a simple modification to the DES: Add an "Other" option to a dropdown menu of firearm types that can be lawfully transferred in California, or otherwise provide alternative instructions for the processing of transfers of Title 1s and other firearms with undefined subtypes in the DES. While Defendants promptly corrected a similar dropdown menu issue in the DES that Plaintiffs had identified in their October 2019 letter, it would be *two years* before the DOJ would make an "Other" option available in the DES.

But by then, Franklin Armory's centerfire Title 1 firearms could no longer be lawfully transferred because Defendants' allies in the state legislature passed a bill effectively banning them. Neither the Attorney General nor the DOJ have the power or discretion to effectively block the sale of otherwise legal firearms. No, the California Penal Code imposes a duty on the DOJ to see to it that all legal firearms can be transferred through the DES or some alternative means. If this Court holds otherwise, it will effectively grant Defendants the power to block all gun sales in the state at will via its control of the DES. Fundamental rights are not so flimsy.

Despite the clarity of this case as pleaded in the SAC, Defendants Department of Justice, Attorney General Bonta, and former Attorney General Becerra attack Plaintiffs' claims on the pleadings—*for a fourth time*—on grounds that it should have brought earlier or that it already did bring and lost. Indeed, Defendants' motion first rehashes the same standing arguments over which Plaintiffs have already twice prevailed. The Defendants' motion then argues that they are entitled to judgment on the pleadings on each of Plaintiffs' remaining claims based on immunities, mootness, or the unavailability of the relief

sought. But these arguments come far too late. The remaining claims have been unstayed for over a year and a half, and the parties have already engaged in extensive discovery. Defendants' motion thus seems less like a good faith attempt to narrow the issues for the parties and this Court and more like a stalling tactic, which, incidentally, is the sort of conduct that led Plaintiffs to sue in the first place.

In short, Defendants' motion for judgment on the pleadings should be denied in its entirety. But if the Court grants any part of it, Plaintiffs request leave to amend.

BACKGROUND

I. Statement of Facts

A. California's Scheme for the Transfer and Registration of Firearms Through the Dealer Record of Sale Entry System (DES)

California has reserved the entire field of licensing and registration of firearms for itself. (SAC, ¶ 34, citing Pen. Code, § 53071.)[1] With limited exception, firearm transfers in California must be processed through a dealer licensed to engage in the retail sale of firearms. (§§ 26700.) Under state law, "every dealer shall keep a register or record of electronic or telephonic transfer in which shall be entered" certain information relating to the transfer of firearms. (SAC, ¶ 43.1, quoting § 28100.) And "*for all firearms*," this register or record of electronic transfer *shall* contain certain information, *including the* "*type of firearm*." (Second Am. Compl. ("SAC") ¶ 44.14, quoting §§ 28100, subd. (a), 28160, subd. (a), italics added.) This register is called the Dealer Record of Sale (DROS).

Under section 28205, a DROS must be submitted to the DOJ electronically, "except as permitted by the [DOJ]." (SAC, ¶ 52.) State law also mandates that "[t]he [DOJ] shall prescribe the *form* of the register and the record of electronic transfer pursuant to Section 28105." (SAC, ¶ 43.2, quoting Pen. Code, § 28155, italics added.) The method established by the DOJ for submitting purchaser information required by section 28160, subdivision (a), is known as the DROS Entry System ("DES"). (SAC, ¶ 53.) The DES is a web-based application designed, developed, and maintained by the DOJ and used by firearm dealers to transmit the information required for each firearm transfer to the DOJ. (SAC, ¶ 54.)

As designed, the DES could facilitate the transfer of certain lawful firearms, including

[1] All further statutory references are to the Penal Code unless otherwise indicated.

1 "handguns" (also called "pistols" or "revolvers") and "long guns" (including "rifles," "shotguns," and
2 "rifle/shotgun combinations"). (SAC, ¶ 58.) This information would be entered into the DES during the
3 application process by the user selecting the appropriate type/subtype of a firearm from a dropdown
4 menu. (SAC, ¶ 58.) Many firearms, however, do not qualify as "handguns," "pistols," "revolvers,"
5 "rifles," or "shotguns," as those terms are defined by statute or as "rifle/shotgun combinations." (SAC, ¶¶
6 22-32.)[2] But, before October 1, 2021, the DES dropdown menu for "subtype" that populates when one
7 selects "long gun" as the "gun type" included no option for these firearms with undefined subtypes.
8 (SAC, ¶ 58; see also Mot., pp. 11-12.)

9 Because the DES had no way to capture firearms with undefined subtypes, dealers could not
10 accurately submit the required information for these firearms through the DES. (SAC, ¶¶ 58-59.) And it
11 is unlawful, under California Code of Regulations, title 11, § 4210, to enter inaccurate or incomplete
12 information within the DES. (SAC, ¶ 61, quoting Cal. Code Regs., tit. 11, § 4210, subd. (a)(5) [every
13 user of the DES must affirm that "[a]ll of the information I submit to DOJ through DES shall be true,
14 accurate, and complete to the best of my knowledge"].)[3] So licensed firearm retailers could not then
15 lawfully accept and process transfers of firearms with undefined subtypes, including Title 1s, through the
16 DES. (SAC, ¶¶ 58-63.) What's more, Defendants refused to provide an alternative means of transmitting
17 the required information, even though section 28205, subdivision (c), authorizes it to do so. (SAC, ¶¶ 60,
18 66, 70-71, 75, 135, 145.) Through these administrative and technological barriers, the DOJ, under former
19 Attorney General Becerra, effectively instituted and maintained a policy of prohibiting the transfer of
20 firearms that are "long guns" but are not "rifles," "shotguns," or "rifle/shotgun combinations" through a
21 licensed retailer. (SAC, ¶¶ 63, 93.)

22 Franklin Armory manufactures a series of firearms that are neither "handguns," nor "rifles," nor
23 "shotguns," and which are designated with the model name "Title 1." (SAC, ¶¶ 2-3.) It could not,
24 however, transfer its Title 1 firearms because of Defendants' policy blocking the lawful transfer of
25

26 [2] Firearms that are not "handguns," "pistols," "revolvers," "rifles," or "shotguns" (or "frames" or
27 "receivers" for such firearms) are called "firearms with undefined subtypes" throughout this brief.

[3] In the SAC, Plaintiffs mistakenly cited section 4210, subdivision (b)(1)(6), but no such
28 subdivision exists. The correct citation is California Code of Regulations, title 11, section 4210,
subdivision (a)(5).

1 firearms with undefined subtypes. (SAC, ¶¶ 27-28, 56-63, Ex. C at p. 3.) California Rifle and Pistol
2 Association, Inc. ("CRPA") is a nonprofit organization whose members wish to purchase firearms with
3 undefined subtypes, including centerfire versions of Franklin Armory's Title 1. (SAC, ¶¶ 4-6, 79, 99-
4 102.) Its members could not complete their applications for the lawful transfer of said firearms because of
5 Defendants' alleged policy barring such transfers. (SAC, ¶¶ 4-6, 79, 99-102.)
6 Defendants had long known about this deficiency but, for years, refused requests to correct it.
7 (SAC, ¶¶ 67, 70.) Indeed, Franklin Armory was in communication with the DOJ about the design and
8 features of its Title 1 series of firearms since 2012, and Franklin Armory wrote to Defendant Becerra as
9 early as *October 2019* to inform him of the defect with the DES and the inability to transfer its Title 1s
10 because of it. (SAC, ¶¶ 68-69 & Ex. C at p. 3 ["This defect … has severely impacted my client's business
11 and reputation. On or about October 15, 2019, Franklin Armory® announced their new product, Title
12 1™, which generated a substantial amount of interest. Soon after the announcement, Franklin Armory®
13 was notified by licensed California firearm dealers that they would not be able to transfer the firearms
14 due to technological limitations of the DES."].) So that it could fulfill its many orders for centerfire Title
15 1s, Franklin Armory requested that Defendants Becerra and DOJ make a simple modification to the
16 DES—add an "Other" option to the firearm-type dropdown menu so that legal firearms with undefined
17 subtypes could be processed alongside "handguns," "rifles," and "shotguns" or otherwise correct the
18 issue through alternative means. (SAC, ¶¶ 64-66 & Ex. C at p. 3, 5-6.)
19 Defendants did not move to make the requested changes quickly, so Franklin Armory followed its
20 letter with a detailed government tort claim laying out its concerns. (SAC, ¶ 74 [discussing tort claim
21 submitted in November 2019].) The tort claim was rejected, but in January 2020, the DOJ informed
22 Franklin Armory that it was "currently implementing the modifications necessary to enable DES to
23 process sales of the new Title 1 firearm," but that it would take "several months" to complete that
24 process. (SAC, ¶ 74.) Yet, in the following months, Defendants made no public efforts to correct the
25 deficiencies of the DES or authorize other ways to facilitate the transfers. (SAC, ¶ 75.) The DOJ would
26 instead sponsor a bill in the California Legislature making the centerfire Title 1 an "assault weapon."
27 (SAC, ¶¶ 108-114.)
28 In fact, the DOJ would wait *two years* (and more than a year into this lawsuit) to make the

requested change, (Mot., p. 12), even though it had already proven it could make such a change in mere weeks, (SAC, ¶ 73).[4] The DES "fix," however, came far too late for Plaintiffs. It was not made public until *more than a year after* Senate Bill 118 ("SB 118") took effect, designating Franklin Armory's centerfire Title 1s as "assault weapons and effectively banning their sale and transfer. (Mot., p. 11.)

B. Senate Bill 118 and the Expansion of California's "Assault Weapon" Ban

Because Defendants knew that Franklin Armory could not and would not transfer its Title 1 series of firearms until the DES was corrected, Plaintiffs allege that Defendants intentionally delayed fixing the DES (despite assurances that work had begun as early as January 2020) to continue barring the lawful transfer of Title l firearms to Franklin Armory's customers until legislation could be developed, proposed, and passed designating centerfire Title 1 firearms as "assault weapons." (SAC, ¶ 69, citing Ex. C at p. 3 (Letter from Jason Davis, The Davis Law Firm, to Xavier Becerra, California Attorney General, Re: Franklin Armory, Inc. DES "Gun Type" Drop Down List (Oct. 24, 2019); see also SAC, ¶ 109, citing SAC, Ex. F (Email from Jennifer Kim, Principal Consultant, Assembly Budget Committee, to Jason Sisney Re: Assault Weapon TBL—Add'l Info FYI (June 24, 2020)).)

Defendants' nefarious scheme proved successful with the passage of Senate Bill 118 ("SB 118"), which passed and became law on August 6, 2020. (SAC, ¶¶ 110-112.) The law expanded the statutory definition of "assault weapon" to include any "semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that does not have a fixed magazine, but that has any one" of a list of enumerated characteristics, like a forward pistol grip or thumbhole stock. (Sen. Bill 118 (2019-2020 Reg. Sess.) § 38; see also SAC, ¶ 112.) While SB 118 technically allowed those in possession of firearms deemed "assault weapons" under the newly implemented definition to register and keep their guns if they possessed them before September 1, 2020, the exception was merely illusory. (SAC, ¶ 113.) Defendants and their allies in the legislature knew that Title 1s had not been transferred to their intended purchasers in California because of the DES defect described above. (SAC, Ex. C at p. 3.) And because Defendants refused to correct the issue until October 2021, there was no way for Title 1 purchasers to take lawful possession

[4] The DOJ promptly fixed a defect in the DES that omitted the United Arab Emirates from the list of countries available in a dropdown list for the "countries of birth"—a deficiency that Franklin Armory reported at the same time it raised the issue of firearms with undefined subtypes. (SAC, ¶ 73.) DOJ

before the cutoff. (SAC, ¶ 113.)

In short, the effect of SB 118 was to designate Franklin Armory's centerfire Title 1s as "assault weapons" and to restrict the transfer of such firearms to customers (including CRPA members) despite existing orders that long predated SB 118.

II. Procedural History

Because Defendants' conduct described above effectively denied Plaintiffs of their due process, property, and Second Amendment rights, Plaintiffs sued for equitable relief and damages. (Compl., ¶¶ 114-204) They alleged several causes of action, including a petition for writ of mandate directing the DOJ to correct the defect of the DES that bars the transfer of otherwise lawful firearms with undefined subtypes, including Title 1 firearms, or authorize other ways to transmit the required information. (Compl., ¶¶ 123-129.) In August 2020, Plaintiffs filed a First Amended Complaint ("FAC"), adding four claims—some related to changes in state law affecting their claims. (FAC, ¶¶ 163-202.) The Court stayed all but the First, Second, and Eighth Causes of Action. (Tr. Setting Conf. Order, Oct. 15, 2020.)

After Plaintiffs filed the FAC, Defendants demurred to the three unstayed claims. Sustaining the demurrer, the Court ruled that Plaintiffs could not succeed on their unstayed claims—at least as related to the transfer of *centerfire* Title 1 firearms for which deposits had been made. (Decision on Dem., Jan. 28, 2021, p. 9.) The Court held that because the deadline to take possession of such firearms to register them as "assault weapons" passed in September 2020, the Court lacked authority to direct the DOJ to facilitate the transfer of such firearms through writ relief, rendering the case both moot and unripe, and leaving Plaintiffs without standing to pursue their claims. (*Id.* at pp. 5-8.) Satisfied, however, that Plaintiffs could allege that Franklin Armory manufactures rimfire Title 1s that are not "assault weapons" and that CRPA represents members who wish to purchase other firearms with undefined subtypes, the Court granted Plaintiffs leave to amend. (Hrg. Tr., Jan. 28, 2021, p. 8:21.)

Plaintiffs filed a timely SAC, alleging that countless firearms, including rimfire Title 1s, buntlines, butterfly grip firearms, and barreled action firearms without a stock, remain legal but cannot be transferred due to Defendants' policy of barring the transfer of firearms with undefined subtypes. (SAC,

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confirmed that it had corrected the "country of origin" deficiency on November 26, 2019. (SAC, ¶ 73.)

¶¶ 27-32, 57-63.) And in line with its representations at the demurrer hearing, (Hrg. Tr., pp. 10:13-14:13), Plaintiffs clarified that the Court should issue a writ directing DOJ to stop blocking the transfer of centerfire Title 1 firearms for which deposits had been made before August 6, 2020, for two reasons. First, because those who had placed a deposit on a centerfire Title 1 would have taken legal possession of their firearms before September 2020 but for Defendants' illicit conduct. (SAC, ¶ 123.a.) Second, because Defendants' conduct violated the due process rights of Plaintiffs and their customers, members, and supporters. (SAC, ¶ 123.b.)

In response to the SAC, Defendants demurred again to the First, Second, and Eighth Causes of Action. (Mot., p. 12.) The Court overruled the second demurrer and ordered Defendants to answer. (Decision on Dem. ("June 2021 Dem. Dec."), June 3, 2021, at p. 9.) Defendants filed their answer, but only as to the then-unstayed causes of action. (Answer, June 23, 2021, pp. 4-11.) Moreover, the answer contained 53 affirmative defenses, most of which were boilerplate, so Plaintiffs responded with a demurrer and motion to strike, which the Court mostly sustained. (Min. Order, Oct. 26, 2021.) By then, however, DOJ had finally modified the DES to add an "Other" option that went "live" on October 1. (Mot., at p. 12.) Due to that change, Defendants moved to dismiss the First, Second, and Eighth Causes of Action as moot. (*Ibid.*) The parties engaged in some limited discovery, and the Plaintiffs opposed the DOJ's motion. (Pls.' Oppn. Defs. Mot. Dismiss SAC, Jan. 13, 2022.) But, on January 27, 2022, Judge Chalfant dismissed the three causes of action as moot and transferred the remaining claims to this Department. (Dec. on Mot. Dismiss, Jan. 27, 2022, p. 11.)

On March 2, 2022, the parties participated in a case management conference with this Court, during which counsel or Defendants first announced they would likely file a motion for judgment on the pleadings. They would not file that motion until August 14, 2023, setting a hearing for September 6, giving Plaintiffs about a week to oppose a motion that Defendants had been preparing for over a year. Additionally, the parties have spent considerable time and resources conducting written discovery and preparing to conduct depositions, making it even more puzzling why Defendants waited until now to bring its belated motion. Defendants' extreme delay in pursuing judgment on the pleadings—on many of the same grounds it already raised—suggests that its motion is without merit.

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ARGUMENT

I. Legal Standard

A motion for judgment on the pleadings is subject to the same review as a general demurrer. (*Tukes v. Richard* (2022) 81 Cal.App.5th 1, 18.) "All that is necessary against a general demurrer is that, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendant." (*Hilltop Props., Inc. v. State* (1965) 233 Cal.App.2d 349, 354.) A pleading is adequate if it contains enough facts to apprise the defendant of the factual basis for the plaintiffs' claim. (*McKell v. Wash. Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1469-1470.) And like a demurrer, in a motion for judgment on the pleadings, courts must accept as true the plaintiff's factual allegations and construe them liberally. (*Tukes*, *supra*, 81 Cal.App.5th 1, 18.) If there is more than one reasonable interpretation, courts must draw any "inferences favorable to the plaintiff." (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238 (*Perez*).)

II. Plaintiffs Have Standing to Pursue Relief; They Do Not Have to Engage in Futile Acts to Establish Standing

Standing in California courts is more flexible than in the federal forum. Unlike federal Article III standing, standing in California is not a jurisdictional prerequisite. "[O]ur state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248.) California also departs from the strict separation of powers considerations that rigid application of standing doctrine in federal courts exists to serve. (See *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540 1547 [explaining that "standing" in the federal forum prevents usurpation of power from the elected branches of government]; see also *People v. Bunn* (2002) 27 Cal.4th 1 [37 P.3d 380, 388] [In California, "it is well understood that the branches share common boundaries and no sharp line between their operations exist."].)

Despite this more prudential standard, some familiar notions of standing requirements do apply. For instance, to have standing in state court, a party must show that they "have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' [Citation.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical." (*City of*

1 *Palm Springs v. Luna Crest Inc.* (2016) 245 Cal.App.4th 879, 883 (*Palm Springs*), quoting *Cty. of San*
2 *Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 814.) Where a party can show "injury as to
3 himself," standing for injunctive relief is established. (See *Connerly v. Schwarzenegger* (2007) 146
4 Cal.App.4th 739, 748.) To defeat the DOJ's motion for judgment on the pleadings, Plaintiffs have met
5 the minimal pleading requirements necessary to establish standing to pursue their remaining claims.

6 Plaintiffs allege facts showing that Plaintiffs, their customers, and members have suffered or will
7 suffer an injury due to the alleged limitations of the DES. (See, e.g., SAC ¶¶ 1-6, 22-33, 51-63, 79, 98-
8 102, 124,133-136, 158-159, 164, 179-181.) They allege that Franklin Armory manufactures firearms that
9 it cannot transfer in California because of Defendants' alleged misconduct. (SAC, ¶¶ 2-3, 69, Ex. C at p.
10 3.) They also allege that CRPA represents the interests of its members:

11 > [W]ho wish to and have attempted to sell, purchase, acquire, transfer, and possess
> lawful firearms, including but not limited to the FAI Title 1 series of firearms,
12 > buntline revolvers, butterfly grip firearms, and stockless barreled action firearms,
> but are prohibited from doing so by the technological limitations implemented by
13 > [the DOJ].

14 (SAC, ¶ 6.) Defendants' conduct has caused Plaintiffs, their customers, and members to be denied their
15 right to transfer and acquire lawful firearms and will cause Franklin Armory significant financial injury
16 due to lost sales. (SAC, ¶¶ 79, 98-102, 136, 147, 159.) Under any reasonable measure, these allegations
17 demonstrate a "concrete and actual" interest. (*Palm Springs*, *supra*, 245 Cal.App.4th at p. 883.)

18 Still, the DOJ calls Petitioners' standing into question, claiming—for the third time now—that
19 "Plaintiffs fail to allege any attempt to apply for transfer of a firearm and thus do not have standing"
20 (Mot., p. 18.) To be sure, Plaintiffs do not allege that their customers or members somehow convinced
21 third-party licensed dealers to (unlawfully) submit an inaccurate application for the transfer of an
22 undefined firearm subtype. But they do allege that CRPA members not only wish to purchase *but also*
23 *took affirmative steps to reserve* centerfire Title 1 firearms. (SAC, ¶¶ 6, 79.) For instance, they allege that
24 Ryan Fellows, a member of CRPA, "placed a deposit on a 5.56 NATO centerfire FAI Title 1 firearm,"
25 but was "unable to process the transfer of the firearm due to [Defendants'] conduct described [in the
26 SAC] as well as the subsequent passage of SB118." (SAC, at ¶ 99.) The SAC also alleges, among other
27 things, that Franklin Armory has:

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- "[C]ustomers who have reserved orders and deposited moneys for the FAI

Title 1, but who [could not] receive their lawful firearms because of the barricades placed upon such transfers via technological defects of the DES and administrative delays correcting the same," (SAC, ¶ 130);

- "[T]ens of thousands of contracts to sell FAI Title 1 firearms" in California, (SAC, ¶ 131);
- "[R]elationships … with its customers and prospective customers, including California dealers and consumers," (SAC, ¶ 142);
- A "high volume of preorders [of Title 1s] by FAI's California customers, (SAC, ¶ 143); and
- "[T]ens-of-thousands of reserved sales for the FAI Title 1 in an amount approximating $33,000,000.00, lost *profits* in an amount to be proven at trial, but approximating $5,000,000.00, and incurred reputational [injury] due to the inability to fulfill customer orders," (SAC, ¶ 147).

And discovery recently turned over to the Defendants shows that licensed firearm retailers have ordered centerfire Title 1s from Franklin Armory but are waiting to take possession of those firearms pending the outcome of this litigation.[5] These are examples of the concrete interests that Plaintiffs and their thousands of customers and members have in this action. Plaintiffs need allege no more at this stage. In fact, Judge Chalfant already ruled that Plaintiffs "are not required to allege evidentiary details to achieve standing." (June 2021 Dem. Dec., p. 6.)

To the extent that Defendants are *again* claiming that Plaintiffs' petition must identify specific individuals that have taken more concrete action toward purchasing the subject firearms, like submitting an improper application through the DES, Judge Chalfant has rejected that notion, too. (June 2021 Dem. Dec., p. 6 ["The SAC alleges sufficient facts to demonstrate that Petitioners have a beneficial interest in the mandamus and declaratory relief claims to compel DOJ to fix the DES process."].) He already ruled that Plaintiffs "and CRPA members need not perform useless acts as a prerequisite to seeking judicial relief." (*Ibid.*, citing *Van Gammeren v. City of Fresno* (1942) 51 Cal.App.2d 235, 240; see also *Doster v. Cty. of San Diego* (1988) 203 Cal.App.3d 257, 262 [the law does not require "futile acts"].)

The SAC alleges that, at all times relevant, firearm retailers could "accurately submit the required information through the DES for 'long guns' that [are] 'firearms with an undefined subtype," they were thus "prohibited from processing and accepting applications from purchasers of said firearms." (SAC, ¶

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[5] So, even if this Court were to rule that the SAC is not clear enough that Franklin Armory had

62, citing Penal Code, § 28215, subd. (b).) "The background check begins with the completion and submission of an application form that the gun dealer electronically submits to the California DOJ." (*Silvester v. Harris* (9th Cir. 2016) 843 F.3d 816, 825.) Thus, the first step in "attempting to purchase" a firearm is to apply with the dealer. But under California Code of Regulations, title 11, § 4210, subdivision (a)(5), firearm dealers must expressly affirm that everything they enter into the DES is "true, accurate, and complete to the best of [their] knowledge." Moreover, had Plaintiffs incited dealers to attempt to transfer the firearms by knowingly entering incorrect information into the DES, such actions would amount to conspiracy to violate California's firearm laws under Penal Code section 182. In short, any attempt to complete an application for a firearm with an undefined subtype would thus be futile, an idle gesture, or violate state law, exposing the dealer (and potential purchaser) to criminal or civil penalties.

Notably, the DOJ does not argue that, before October 1, 2021, the transfer of firearms with undefined subtypes *could* be facilitated through the DES despite Plaintiffs' claims. Instead, it suggests that if a retailer submits a false DROS in violation of state law, it *might not* reject the record and halt the transfer. (Mot., p. 12.) The argument is illogical. Plaintiffs need not rely on the willingness of third parties to violate the law and risk civil or criminal penalties, including the loss of their licenses, to have standing. It is enough that firearm retailers will not transfer these firearms because they cannot submit an accurate DROS because of the technological limitations of DES. (SAC, Ex. C at p. 3.)

Defendants present a weak comparison to an old case on licensing where the Ninth Circuit held that plaintiff lacked standing because he did not apply for a license merely because there was a danger of refusal. (Mot, pp. 18-19, citing *Robins v. County of Los Angeles* (1966) 248 Cal.App.2d 1, 12.) Here, there was not a mere "danger" of refusal. If Franklin Armory had borne the expense (and risk) of shipping out the Title 1 firearms, and customers tried to buy them at their local gun shops, they no doubt would have been denied. As Franklin Armory informed former Attorney General Becerra in October 2019, "[s]oon after the announcement [of the Title 1], *Franklin Armory® was notified by licensed California firearm dealers that they would not be able to transfer the firearms due to technological*

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orders with licensed firearm retailers for Title 1s, Plaintiffs can clearly amend to clarify those allegations.

limitations of the DES." (SAC, Ex. C at p. 3, italics added.) And as explained above, if any dealer had tried to bypass the lack of the "Other" option by entering false information into the DES, they would be breaking the law. (SAC, ¶ 61, quoting Cal. Code Regs., tit. 11, § 4210, subd. (a)(5).)

Concededly, a party may sometimes lack standing to challenge a policy if they have not applied for the desired benefit. (*Id*. at p. 19, citing *Madsen v. Boise State University* (9th Cir. 1992) 976 F.2d 1219, 1220). But even in the licensing and application contexts, an exception for futile acts still exists. (See, e.g., *Desert Outdoor Advert., Inc. v. City of Moreno Valley* (9th Cir. 1996) 103 F.3d 814, 818 ["Desert and OMG also have standing to challenge the permit requirement, even though they did not apply for permits, because applying for a permit would have been futile."].) Indeed, *Madsen*—the very case Defendants rely on—acknowledges that its ruling does not extend to situations where applying would be futile: "Nor are there findings or allegations that the University had an impenetrable policy—akin to a 'Whites Only' sign—which would have rendered it impervious to any efforts to educate it as to defects in its policies." (*Madsen*, *supra*, 976 F.2d 1219, 1222.)

Here, Franklin Armory *did* attempt to educate Defendants Becerra and DOJ, informing them in writing of the defect and the resulting inability to transfer Title 1 firearms. (SAC, ¶ 69 & Ex. C.) Franklin Armory followed that letter with a detailed government tort claim. (SAC, ¶ 74.) The tort claim was rejected, but the DOJ made assurances in January 2020 that it was working on "the modifications necessary to enable DES to process sales of the new Title 1 firearm." (Davis Decl., Ex. 3 at p. 4 [Letter from P. Patty Li, Deputy Attorney General, Department of Justice, to Jason Davis (Jan. 8, 2020)].) Yet, Defendants would make no public efforts to correct the alleged deficiencies of the DES or authorize other ways to effectuate the transfers for nearly two years, leaving Plaintiffs without any means of submitting the applications Defendants now argue they should have submitted. (SAC, ¶¶ 75-76; Mot. pp. 11-12.) In short, by leaving no possibility for the successful transfer of Title 1s until the DES was fixed, Defendants ensured no futile attempt to apply to transfer one would reasonably be made.

Finally, Defendants' citation to *Olson v. Manhattan Beach Unified School District* (2017) 17 Cal.App.5th 1052 (*Olson*), is inapposite. (Mot., at p. 19.) That case concerned a plaintiff who did not exhaust all available remedies because he had not filed a government claim. (*Olson*, *supra*, 17 Cal.App.5th at p. 1054.) Plaintiffs indisputably pursued such relief as early as November 2020. (SAC, ¶

74.) And even if they had not, the futility exception "recognizes that the exhaustion doctrine should not apply in those instances where the pursuit of administrative remedies is demonstrably futile." (*Redevel. Agency v. Super. Ct.* (1991) 228 Cal.App.3d 1487, 1498, modified (May 1, 1991).) Again, after being informed of the lack of an "Other" option through their tort claim (among other avenues), Defendants denied the claim and refused to fix the issue for nearly two more years. (SAC, ¶¶ 74-75; see also Mot., at pp. 11-12.) On the one hand, Defendants claim that the "overhaul" of the DES was so complex that it took two years to complete, while on the other hand arguing that "plaintiffs cannot positively state what DOJ would have done" if someone attempted to transfer a Title 1 firearm. (Mot., at p. 12, but see Barvir Decl., Ex. 1 at pp. 6-7, Ex. 2 at p. 13 [showing that once the DOJ began earnestly working to add the "Other" option in July 2021, the process only took about 50 days].) But there is no reason to believe Defendants would have done anything but what they did after Franklin Armory notified them of the issue—nothing.

Given all this, it is absurd to argue that Plaintiffs must have engaged in costly, futile acts to have standing. Plaintiffs knew the transfers would not go through. They knew exactly why they would not go through. And they told Defendants about it. Only when Defendants refused to act were Plaintiffs left with no choice but to file this lawsuit. Plaintiffs have clearly alleged enough facts to satisfy the prudential requirements of standing in state court on a motion for judgment on the pleadings, where courts are to draw any "inferences favorable to the plaintiff." (*Perez*, *supra*, 209 Cal.App.4th at 1238.)

III. Plaintiff Franklin Armory Has Stated Valid Causes of Action Against Former Attorney General Becerra

A. Former Attorney General Becerra Had a Ministerial Duty to Enable the Lawful Transfer of All Legal Firearms, Including the Title 1

Former Attorney General Becerra had a ministerial duty to correct the DES once he became aware of the issues preventing the transfer of legal firearms following the letter from Franklin Armory's counsel that was addressed to him. (SAC, Ex. C.) He ignored that duty to stall for time so the legislature could ban the centerfire Title 1 firearms. (SAC, ¶ 145.) Defendants deny any such duty exists. (Mot., at p. 21.) They are wrong and, at least at this stage, it is not even a close question.

"A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion

concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment." (*Cnty. of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 653-654.) Here, state law creates a ministerial duty that the DOJ—under the direction of the Attorney General—maintain the DES so that all legal firearms may be transferred through the system. (Pen. Code, §§ 28155, 28205, 28215, 28220.) While the *form* of the record is left to the DOJ's discretion, (§ 28155), the code does not convey to the Attorney General or the DOJ the authority to prohibit the lawful sale of firearms to law-abiding Californians. "Surely, even the DOJ would admit that it does not have the discretion to refuse to implement an electronic transfer system entirely." (June 2021 Dem. Dec., p. 7.)

Defendants point to the following statutory language allowing the DOJ to authorize other means for transferring the required information: "On or after January 1, 2003, *except as permitted by the* [*DOJ*], electronic transfer shall be the exclusive means by which information is transmitted to the [DOJ]." (Mot., p. 25), quoting Pen. Code, § 28205, subd. (c), italics added.) But that language plainly does not grant Defendants any authority to block otherwise legal firearm transactions, which is the conduct Plaintiffs complain of here. It merely allows the DOJ to provide alternative means for transmitting the required information. Discretion only as to the *method* of transmission of information is the extent of the authority that section 28205, subdivision (c) grants to Defendants.[6] It is not discretion to block the transmission of statutorily required information altogether. If it were, Defendants would have the unfettered power to block the sale of any legal firearm it chooses—or all firearms, for that matter—by sabotaging the DES and claiming it is within its discretion to do so.[7]

But the Penal Code commands that "for *all* firearms, the register or record of electronic transfer *shall* include *all* of the following information…." (Pen. Code, § 28160, subd. (a), italics added.) The code then lists several items that the record of electronic transfer "shall" include, including the "[t]ype of

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[6] The issue here, of course, is despite being informed of the issues, former Attorney General Becerra neither fixed the DES nor did he provide an "exception" or "allow alternatives." He just continued to effectively block the sale of legal firearms, ignoring his ministerial duty to act otherwise.

[7] In the past, Attorneys General seem to have understood their mandatory duty to facilitate the submission of DROS information to DOJ through DES. Indeed, in a letter to the Office of Administrative Law in November 2013 on behalf of then-Attorney General Kamala Harris, the DOJ admitted that "[t]he legal sale of firearms in California is only available via DES" and that DOJ would assume the duty of

firearm." (§ 28160, subd. (a)(14).) By refusing to correct the DES to facilitate the transfer of firearms with undefined subtypes, including Franklin Armory's Title 1, former Attorney General Becerra violated his duty to create a system that allows firearm retailers to transmit all the statutorily required information—for all lawful firearms. And, especially at this stage, arguments about the proper interpretation of section 28160's reference to "all firearms" are "best left for trial," particularly since Judge Chalfant has already considered them. (June 2021 Dem. Dec., p. 8.)

Defendants make a few arguments to resist the conclusion that they had a ministerial duty to act. **First**, they argue that, for purposes of the Government Claim Act, their acts or omissions related to the submission of fees and firearm purchaser information are deemed discretionary under section 28245 and thus do not form the basis for liability. (Mot., p. 25.) But section 28245 speaks only to DOJ's conduct, not the Attorney General's. Plaintiffs have confirmed they are not pursuing damages against the DOJ as to the Third, Fourth, or Fifth Causes of Action, and that they are only pursuing such relief against former Attorney General Becerra in his personal capacity. (*Id*. at p. 13.)

Second, Defendants Becerra and DOJ similarly argue that because they have some discretion over the format and records of electronic transfers, and because the Penal Code does not specify how it is to exercise that discretion, they were under no mandatory duty to act. (Mot., p. 25, citing Govt. Code, § 815.6.) Consequently, Defendants argue, they have no liability for failure to discharge such a duty under Government Code section 815.6. (Mot., pp. 25-26.) But again, Plaintiffs have consistently argued that Defendants' exercise of discretion over *how* they collected the required firearm transfer information was not the problem. Indeed, they have acknowledged that Defendants can use their *limited* discretion to put the DES into whatever form they choose, as long as it meets section 28160's mandate that "for all firearms," the record of electronic transfer "shall include," among other things, "the type of firearm." (Pls.' Oppn. Dem. SAC, p. 18, quoting Pen. Code, § 28160, subd. (a)(14).) Defendants' refusal to provide *any* means for transmitting the required information for firearms with undefined subtypes, effectively prohibiting the transfer of such firearms through a licensed retailer violated their ministerial duty to act and gives rise to liability. (See, e.g., SAC, ¶¶ 60, 66, 70, 75, 76, 135, 145.)

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maintaining the DES on January 1, 2014. (SAC, ¶ 83, Ex. D, p. 1.)

Former Attorney General Becerra lacked the authority to block the transmission of statutorily required information by refusing to correct the known DES defect or to provide alternative means for its transmission. The conveyance of some discretionary authority in the method of executing a mandatory duty does not give blanket power to ignore that duty altogether. Indeed, "[i]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail...To the extent that its performance is unqualifiedly required, it is not discretionary, even though the manner of its performance may be discretionary." (*Ham v. Cty. of L.A.* (1920) 46 Cal.App. 148, 162.)

In *Ham v. County of Los Angeles*, a case about a duty to repair streets and highways, the court held there was a duty for street superintendents and road supervisors to complete their ministerial duty to repair roads when on notice that repairs were needed. (46 Cal.App. at p. 162.) That example is helpful here. While the public servants in *Ham* may have had significant discretion in the manner of repairing the streets, what they could not do was refuse to repair a road they knew needed repair. In the same way, neither the DOJ nor the Attorney General can block the required submission of information about the transfer of any legal firearm, even though they can decide on the form the DES takes. Defendants' position would rewrite *Ham* to say that the road supervisors had no duty to repair a particular street so long as they have discretion to decide on the *methods* of repair. This cannot be correct.

Even if the Court were to find that former Attorney General Becerra had significant discretion over the DES beyond just its form, he was still required to facilitate the sale of legal firearms with undefined subtypes. "Where only one choice can be a reasonable exercise of discretion, a court may compel an official to make that choice." (*Cal. Correct. Supervs. Org. v. Dept. of Corr.* (2002) 96 Cal.App.4th 824, 827.) There is a single reasonable choice here. And that is the one that facilitates the transfer of required information to the DOJ, as mandated by the Penal Code, so that legal firearm sales can be completed. If Defendants' interpretation of the Penal Code were correct, it could block any firearm transaction it chooses by deleting options for "disfavored" types of firearms from the DES and providing no other means to transmit the required information. Such an interpretation is patently unreasonable.

Third, Defendants argue that Plaintiffs cannot meet the second element of Government Code

section 815.6 because "the legislative purpose of these statutes is not to protect the rights of a firearms manufacturer to sell its products." (Mot., p. 26.) But Defendants cite no legislative findings to support its claim. Given that the relevant Penal Code sections facilitate the legal transfer of firearms in an orderly manner that complies with the law, it is just as arguable that one of the goals of the legislature in passing them was to facilitate lawful commerce between law-abiding people and gun makers. If Defendants made a habit of impeding the transfer of legal firearms, then even otherwise law-abiding Californians would have no choice but to buy firearms outside of the confines of the law to exercise their Second Amendment rights. And because the right to keep and bear arms is fundamental, laws that provide the *only* avenues for lawful firearm transfers in California implicitly must protect against the risk of an injury to that right. What's more, such lawful firearm transactions finance the Firearms Safety and Enforcement Special Fund. (Pen. Code, § 28300.)

Tellingly, Defendants do not even argue the third element of section 815.6—i.e., that the failure to act on the mandatory duty proximately caused the alleged injury. This Court should take that as an effective admission that even Defendants know that the Attorney General's politically motivated obstruction caused Plaintiffs' injuries. Thus, Plaintiffs meet all three elements for liability under Government Code section 815.6.

Fourth, Defendants shift back to former Attorney General Becerra specifically to defend him on the grounds that his duty to enforce the law uniformly and adequately does not mean he has to enforce the law in a particular way. (Mot., pp. 26-27.) But the case they cite for this argument, *State of California ex rel. Dept. of Rehab.* (1982) 137 Cal.App.3d 282 (*Dept. of Rehab.*), does not support their position. While subsequent language in that case did modify the Attorney General's duty to see that the laws of the state are adequately enforced, that language, which the DOJ left out of its brief, states: "Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county…" (Cal. Const., art. V § 13.) That language led the court to hold that the duty was discretionary because it hinged on the Attorney General's subjective opinion. (*Dept. of Rehab.*, *supra*, 137 Cal.App.3d at p. 287.) Section 28205 does not confer such broad discretion; it merely allows Defendants to sometimes make exceptions to the rule that electronic transfer is the only way the required information is transmitted. So, while the Attorney General or DOJ might offer variances to how the information is transmitted, *it must*

provide some way to transmit it.

Finally, Defendants argue that discretionary immunity under section 820.2 shields the DOJ and the former Attorney General from liability. (Mot., pp. 27-29.) But *again*, Plaintiffs' position is that while former Attorney General Becerra may have had discretion as to the *method* of transfer and could have allowed an alternative means of transfer until the DES was modified, he had no discretion to block the sales entirely.

B. By Refusing to Act When He Had a Ministerial Duty to Do So, Former Attorney General Becerra Interfered with Plaintiffs' Contractual Relations

Plaintiff Franklin Armory's Third Cause of Action alleges that Defendant Becerra's refusal to correct the DES (or provide an alternative means for the transmission of firearm transfer information for firearms with undefined subtypes), as he had a ministerial duty to do, interfered with Franklin Armory's contractual relations with CRPA members and thousands of other California purchasers of the Title 1. (SAC, ¶¶ 129-138.) Indeed, Franklin Armory alleged that it had contracts with tens of thousands of customers to sell them firearms within California, and that those contracts were obstructed by Defendant Becerra's refusal to act. (SAC, ¶ 131.)

Defendants argue that money deposits, on their own, do not constitute a contract. (Mot., pp. 21-22, citing *Jones v. Wide World of Cars, Inc.* (S.D.N.Y. 1993) 820 F.Supp. 132, 136 (*Jones*).) But the very case they cite is clear that a money deposit, while it may not bind the buyer, can bind the seller. (*Jones*, *supra*, 820 F.Supp. at p. 136 ["cases under the statute of frauds itself suggest that it is the recipient accepting a down payment, not a buyer parting with the money, who may be bound."].) Customers paying earnest money toward the purchase of their Title 1 firearms entered into a contract with Franklin Armory, under which at least Franklin Armory was bound, even if the buyers could later cancel the sale. Admittedly, many have opted to do so because of Defendants' conduct at issue and the time that has passed since the deposits were made. This is precisely what Franklin Armory's Third Cause of Action for tortious interference with contractual relations seeks to redress.

Plaintiffs put former Attorney General Bonta on notice of the issues with the DES, (SAC, ¶¶ 68-69 & Ex. C), yet he intentionally delayed removing these technological barriers and did not offer an alternative means for effecting transfers of Franklin Armory's Title 1 firearms. (SAC, ¶ 130.) Contrary to

Defendants' arguments, former Attorney General Becerra's refusal to act on his duties is sufficient to show that his actions were designed to induce a breach or disruption of the contractual relationship between Franklin Armory and its customers. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1175 [discussing how a particular act or omission may be the legal cause of an invasion of another's interest] (conc. opn. of Chin, J.).)

C. By Refusing to Act When He Had a Ministerial Duty to Do So, Former Attorney General Becerra Interfered with Franklin Armory's Prospective Economic Advantage

Even if this Court believes that former Attorney General Bonta could not have interfered with Franklin Armory's contractual relationship with its customers because the earnest money deposits do not constitute contracts, at minimum, he interfered with their prospective economic advantage, either intentionally (SAC, ¶¶ 139-150 [Fourth Cause of Action]), or negligently by ignoring his ministerial duty to act (SAC, ¶¶ 151-161 [Fifth Cause of Action]). To state a claim for interference with prospective economic advantage, Plaintiffs must show "[1] an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; the defendant's knowledge of the relationship; [2] intentional acts on the part of the defendant designed to disrupt the relationship; [3] actual disruption of the relationship; and [4] economic harm to the plaintiff proximately caused by the acts of the defendant." (*Pac. Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1119-1120.) The tort of interference with prospective economic advantage is considerably more inclusive than actions based on contract, and it is not dependent on the existence of a valid contract. (*Id.* at p. 1119.)

Here, Plaintiff Franklin Armory alleges that it had about 35,000 earnest money deposits to purchase centerfire Title 1 firearms. (SAC, ¶ 79.) Even if some portion of those customers cancel their orders, it is likely that thousands—probably tens of thousands—would have gone through with their purchases had the Title 1 firearms been able to be transferred, netting Franklin Armory millions of dollars in profits. (SAC, ¶ 147.) Former Attorney General Becerra certainly knew about this economic relationship because Franklin Armory explicitly notified him of it when they sent him their October 2020 letter complaining of the issues with DES and demanding that he fix them. Franklin Armory wrote:

> On or about October 15, 2019, Franklin Armory® announced their new product, Title 1™, which generated a substantial amount of interest. Soon after the announcement, Franklin Armory® was notified by licensed California firearm

> dealers that they would not be able to transfer the firearms due to technological limitations of the DES.
>
> As a result, Franklin Armory® is unable to fulfill its orders, which continue to accrue daily. Franklin Armory® anticipates that even the delay of a few months in the correction of the system will result in the loss of approximately $2,000,000 in profits, if not more.
>
> As a result, Franklin Armory® President Jay Jacobson has been in contact and requested that the DES be corrected immediately to prevent the loss of sales and to preserve the reputation of Franklin Armory® within the industry and among its consumers. He has been advised that the Department of Justice is working on correcting the issue but was also informed that no timeline for the correction of the defect has been established. As such, this letter serves to both reiterate the importance of correcting the defect in the DES expediently, and to express and preserve legal and financial the impact that the defect has on Franklin Armory®

(SAC, ¶ 73 & Ex. C at p. 3.)

From there, the former Attorney General refused (intentionally or negligently) to fulfill his mandatory duty to fix the DES or provide some other alternative avenue for transferring the firearms. (SAC, ¶ 145; see also Part II.A., *supra* [discussing Becerra's ministerial duty].) This was an independently wrongful act, given his clear duty to see that lawful firearms could be transferred through the DES. Former Attorney General Becerra knew of the high interest in Title 1 firearms and chose to continue obstructing their sale. (SAC, Ex. C at p. 3.) And while it is not necessary to show that Defendant Becerra acted with the specific intent to disrupt Franklin Armory's economic advantage, (*San Jose Constr., Inc. v. S.B.C.C., Inc*. (2007) 155 Cal.App.4th 1528, 1544-1545), the allegations of the SAC clearly show that he harbored such intent.

Franklin Armory's economic relationship with its customers was disrupted because the former Attorney General refused to act on his duties, costing the company millions of dollars in lost sales. A prima facie case of interference with prospective economic advantage has been pleaded.

IV. EQUITABLE RELIEF REMAINS AVAILABLE TO PLAINTIFFS FOR THEIR SECTION 1983 CLAIMS

Defendants appear to believe that, in essence, their ploy worked. They stalled the DES fix long enough for the legislature to pass SB 118, and they permanently thwarted the transfer of tens of thousands of Title 1 firearms. (Mot., at pp. 31-32.) But SB 118 does not mean that this Court cannot order Defendants to allow the sale and transfer of Title 1 firearms to those that had placed earnest money deposits well before SB 118 became law. Indeed, the DOJ itself has previously agreed to make

exceptions to legal deadlines to register so-called "assault weapons" when its broken CFARS website prevented people from meeting the original deadline of June 30, 2018 (much like the DES defect preventing the transfer of Franklin Armory's Title 1 firearms).[8] There is no reason the same relief cannot be made available here. Plaintiffs, including their customers and members, have a liberty interest in the right to acquire, sell, deliver, transfer, and possess lawful firearms. (SAC, ¶ 176.) Thousands of people, including members of Plaintiff CRPA, still have active earnest money deposits, and they are ready and willing to complete their purchases of Title 1 firearms. Indeed, upon this Court's order directing the DOJ to allow the transfer and once again reopen the "assault weapon" registration window for those customers, they would do so.

While declaratory relief is indeed unavailable to correct purely past wrongs, (Mot., at p. 32, citing *Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497), plaintiffs suffering from ongoing harms are entitled to declaratory relief. (See *In re D.P.* (2023) 14 Cal.5th 266, 276 ["First, the plaintiff must complain of an ongoing harm. Second, the harm must be redressable or capable of being rectified by the outcome the plaintiff seeks."].) Plaintiffs complain of indisputably ongoing harm. They allege that they will continue to suffer harm due Defendants' blocking the transfer of their Title 1 firearms, (SAC, ¶ 179), and their prayer for relief specifically asks this Court to enjoin the enforcement of SB 118 to the extent it blocks the acquisition, possession, and registration of centerfire variants of the FAI Title 1. (SAC, p. 43).

Defendants argue that Plaintiffs' procedural due process claims are barred when an adequate remedy exists under state law, and Plaintiffs availed themselves of mandamus earlier in this case. (Mot., at p. 32.) However, courts have long held that this principle does not apply when the violation is caused by actions taken according to established state procedures. In such a case, post-deprivation remedies (like a writ of mandamus) fail to satisfy the basic requirements of procedural due process. (*Sorrels v. McKee* (9th Cir. 2002) 290 F.3d 965, 971, citing *Hudson v. Palmer* (1984) 468 U.S. 517, 532.) Particularly with the adoption of SB 118, this is a case where the "state system itself that destroys a complainant's property interest, by operation of law." (*Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 436.) Even before

[8] See Pls.' Req. Jud. Ntc., June 29, 2021, at Ex. A (stipulated judgment and consent decree in the

1 the adoption of SB 118, Plaintiffs' complaint alleged a non-statutory procedure that Defendants
2 promulgated, maintained, and enforced. (SAC, ¶ 93.)

3 Next, Defendants claim that Plaintiffs' Seventh Cause of Action cannot lie because the right to
4 contract freely is not an interest protected by substantive due process. (Mot., at p. 33.) But Plaintiffs'
5 claim is not predicated on the right to contract alone. As the SAC alleges, Defendants' conduct deprived
6 Plaintiffs of their fundamental "right to acquire, sell, deliver, transfer, and possess lawful firearms," both
7 directly and indirectly, as that interest is intertwined with Plaintiffs' right to contract in lawful commerce.
8 (SAC, ¶¶ 175-176.) The Second Amendment protects the attendant rights that make the right to keep and
9 bear arms meaningful, (*Boland v. Bonta* (C.D. Cal. Mar. 20, 2023) No. 22-cv-01421, 2023 U.S. Dist.
10 LEXIS 51031, at *14-15), and the right to possess firearms necessarily implies a corresponding right to
11 acquire them, (*Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 704). By interfering with Plaintiffs'
12 ability to contract freely in the context of exercising their Second Amendment rights, Defendants eroded
13 *both* the right to keep and bear arms and their right to contract. Plaintiffs have alleged that Defendants'
14 conduct has deprived them of interests protected by substantive due process.

15 Finally, Defendants argue that their conduct here does not "shock the conscience," and so they
16 cannot be liable under Plaintiffs' substantive due process claim. (Mot., at pp. 33-34.) To be sure, in
17 substantive due process cases premised on abusive executive action, the plaintiff must show that the
18 complained of government action "'shocks the conscience,' or interferes with rights 'implicit in the
19 concept of ordered liberty.'" (*United States v. Salerno* (1987) 481 U.S. 739, 746, quoting *Rochin v.
20 California* (1952) 342 U.S. 165, 172.) While "liability for negligently inflicted harm is categorically
21 beneath th[is] threshold," "conduct *intended to injure* in some way unjustifiable by any government
22 interest is the sort of official action most likely to rise to the conscience-shocking level." (*Ibid.*) This is
23 not to say that culpability falling somewhere between these two extremes does not also "shock the
24 conscience." (*Ibid.*) To the contrary, the Supreme Court has, at least once, held "that such conduct is
25 egregious enough to state a substantive due process claim." (*Ibid.* ["deliberate indifference" satisfied the
26 fault requirement for substantive due process claims based on the medical needs of pretrial detainee]; see
27
28

matter of *Sharp v. Becerra* (E.D. Cal. Mar. 29, 2021) No. 18-cv-02317).

also *Castro v. City of Los Angeles*, (9th Cir. 2016) 833 F.3d 1060, 1067-1068 [holding that substantive due process requires a showing of "deliberate indifference"]; *Sharp v. Becerra* (E.D. Cal. 2019) 393 F. Supp. 3d 991, 997-98 [same].)

In short, the "constitutional concept of conscience-shocking behavior," (*Cnty. of Sacramento v. Lewis* (1998) 523 U.S. 833, 849 (*Lewis*)), does not require that the government go to the sort of disturbing extremes one might envision when thinking generally of "shocking" conduct. For example, the Eastern District of Pennsylvania has held that even simple zoning measures interfering with constitutionally protected activity can "rise to the level of shocking the conscience." (*Dev. Grp., LLC v. Franklin Twp. Bd. of Supers.* (E.D. Pa. Dec. 7, 2004) No. 03-2936, 2004 U.S. Dist. LEXIS 24681, at p. *49, citing *Eichenlaub v. Twp. of Ind*. (3d Cir. 2004) 385 F.3d 274, 285.) When the *government* intentionally interferes with constitutionally protected conduct or acts with deliberate indifference to the constitutional rights of its citizens—the very rights that government actors swear to uphold and defend—it can hardly be characterized as anything but "conscience-shocking."

In *Sharp v. Becerra*, the Eastern District of California denied the DOJ's motion to dismiss a substantive due process claim under circumstances similar to, but arguably less egregious than, the conduct Plaintiffs challenge here. (*Sharp v. Becerra* (E.D. Cal. 2019) 393 F.Supp.3d 991.) The *Sharp* plaintiffs were owners of firearms that had been designated as "assault weapons"; they had to register those firearms with the DOJ to remain in lawful possession of them. (*Id.* at p. 995.) The DOJ launched an online system for registration, but it was plagued with glitches and often crashed. (*Ibid.*) As a result, the plaintiffs could not register their firearms before the window closed. (*Id.* at p. 996.) The court observed that the case involved "alleged governmental neglect that ran through an entire executive department charged with administering a statewide online program that ran the course of almost an entire year." (*Id.* at p. 998.) It thus held that the "plaintiffs ha[d] adequately pled deliberative indifference inasmuch as [the DOJ] arguably 'disregarded a known or obvious consequence' of the way they handled the registrations." (*Id.*, quoting *Bryan Cnty. v. Brown* (1997) 520 U.S. 397, 410.) Significant to this holding, the court continued, was the allegation that the DOJ was "not only fully aware of the system's problems but also failed to rectify them despite pleas from the public." (*Ibid.*)

This case is on all fours with *Sharp*. Plaintiffs allege that Defendants interfered with their right to

purchase legal firearms, a constitutionally protected activity. They also allege that Defendants did so through a *known* defect in the DES that prevented Californians from applying to complete the lawful transfer of centerfire Title 1s. (SAC, ¶ 69.) Franklin Armory notified the DOJ of the deficiency as early as October 2019—*nearly a year before the window for taking possession of centerfire Title 1s closed*—and asked the DOJ to fix it. (SAC, ¶ 69.) While the DOJ first claimed it would fix the problem, (Davis Decl., Ex. 3 at p. 4), it would be *two years* before the DOJ unveiled an option within the DES to facilitate the transfer of firearms with undefined subtypes. At a minimum, the DOJ acted with "deliberate indifference," disregarding "'a known or obvious consequence' of the way they handled the registrations." (*Sharp*, *supra*, 393 F.Supp.3d 991 at p. 995.) Plaintiffs have thus pled enough to establish the requisite level of culpability under substantive due process precedents.

V. PLAINTIFFS SUBMIT TO THIS COURT'S EARLIER RULINGS ON MOOTNESS, BUT EXPRESSLY PRESERVE THEIR RIGHT TO APPEAL

Finally, Defendants move for judgment on the pleadings as to Plaintiffs' Ninth Cause of Action, a claim seeking to prevent Defendants' unlawful expenditure of taxpayer funds for "the installation and maintenance of the DES that is noncompliant with California laws relating to the sale and transfer of firearms." (Mot., pp. 29-31; SAC, ¶ 203.) Defendants argue that dismissal of the Ninth Cause of Action is supported by Judge Chalfant's earlier findings that the DOJ's belated correction to the DES mooted Plaintiffs' First, Second, and Eighth Causes of Action for equitable and that the conduct complained of in those claims was not likely to recur.

For all of the reasons that Plaintiffs opposed Defendant's motion to dismiss the First, Second, and Eighth Causes of Action, they also strongly oppose Defendants' attempt to escape liability under the Ninth Cause of Action. (Pls.' Oppn. Mot. Dismiss SAC, pp. 10-18.) To summarize, there is little reason to believe the Defendants will not resume its illegal conduct (and the attendant illegal expenditure of taxpayer funds) if they succeed in seeing this case dismissed. Defendants have indeed shown they can quickly change course, giving them the unchecked ability to restrict the lawful transfer of firearms with undefined subtypes through the DES once again. Without an order from this Court, Defendants could just as easily reinstate the barriers that Plaintiffs challenge here. And Defendants have several options for doing just that. For instance, they could modify the DES again, removing the "Other" option

altogether. Indeed, deploying the changes to the DES took only a couple of months at most (Barvir Decl., Ex. 1 at pp. 6-7, Ex. 2 at p. 13), and it is very plausible that undoing such changes would be even quicker.

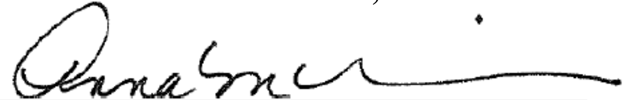
That said, Plaintiffs reluctantly submit to the earlier findings of this Court to the extent that they control this Court's handling of their Ninth Cause of Action.[9] In doing so, however, they do not waive their right to appeal the Court's earlier findings of mootness and the resulting dismissal of their First, Second, Eighth, or Ninth Claims.

CONCLUSION

For these reasons, the Court should deny Defendants' motion for judgment on the pleadings. To the extent that this Court is inclined to grant any party of Defendants' motion, Plaintiffs expressly request that the Court exercise its broad discretion under Code of Civil Procedure sections 473 and 576 to allow them to amend their SAC in the furtherance of justice. "This statutory provision giving the courts the power to permit amendments in furtherance of justice has received a very liberal interpretation by the courts of this state." (*Klopstock v. Super. Ct.* (1941) 17 Cal.2d 13, 19; see also *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939.) Indeed, a court must provide leave to amend a complaint so long as "there is a reasonable possibility that the defect can be cured by amendment." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Failure to allow such amendment is an abuse of discretion. (*Ibid.*, see also *King v. Mortimer* (1948) 83 Cal.App.2d 153, 158 ["Unless it shows on the face that it is incapable of amendment denial of leave to amend constitutes abuse of discretion."].)

Date: August 23, 2023

MICHEL & ASSOCIATES, P.C.



Anna M. Barvir
Attorneys for Petitioners-Plaintiffs

[9] Right before Defendants filed this motion, the parties had exchanged correspondence over whether Plaintiffs would agree to voluntarily dismiss their Ninth Cause of Action without prejudice. As they must do, Plaintiffs' counsel brought the request to their client but had not yet received a response when Defendants suddenly filed their motion.

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On August 23, 2023, I served the foregoing document(s) described as

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

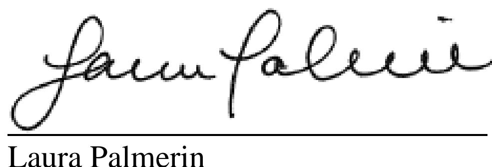
on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof by the following means, addressed as follows:

Kenneth G. Lake
Deputy Attorney General
Email: Kenneth.Lake@doj.ca.gov
Andrew Adams
Email: Andrew.Adams@doj.ca.gov
California Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Attorney for Respondents-Defendants

X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission through One Legal. Said transmission was reported and completed without error.

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

Executed on August 23, 2023, at Long Beach, California.



Laura Palmerin