

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
IN AND FOR THE SECOND APPELLATE DISTRICT

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

Plaintiffs and Appellants,

v.

CALIFORNIA DEPARTMENT OF  
JUSTICE, XAVIER BECERRA, in his  
Official Capacity as Attorney General  
for the State of California, and DOES 1-  
10,

Defendants and Respondents.

Case No. B340913

**APPELLANTS' APPENDIX  
VOLUME III OF XX  
Pages 216-354**

Superior Court of California, County of Los Angeles  
Case No. 20STCP01747  
Honorable Daniel S. Murphy, Judge

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Exempt from filing fees pursuant to  
Government Code section 6103

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9 California, acting by and through the California  
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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
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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

**NOTICE OF DEMURRER AND  
DEMURRER TO THE FIRST, SECOND  
AND EIGHTH CAUSES OF ACTION TO  
THE SECOND AMENDED COMPLAINT  
AND PETITION; MEMORANDUM OF  
POINTS AND AUTHORITIES AND  
DECLARATION OF KENNETH G.  
LAKE IN SUPPORT THEREOF**

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

Honorable James C. Chalfant

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on June 3, 2021, at 9:30 a.m., in Department 85 of the  
above-entitled Court, located at 111 North Hill Street, Los Angeles, California, 90012, defendants

1 and respondents State of California, acting by and through the California Department of Justice  
2 and Former Attorney General Xavier Becerra will move the Court for an Order sustaining their  
3 Demurrer to the First, Second and Eighth causes of action to the Second Amended Complaint and  
4 Petition.

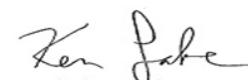
5 Said demurrer will be made, pursuant to Code of Civil Procedure section 430.10,  
6 subdivision (e), on the ground that the First, Second and Eighth causes of action fail to state facts  
7 sufficient to constitute a cause of action.

8 This Demurrer is based on this Notice, the Memorandum of Points and Authorities and the  
9 Meet and Confer Declaration of Kenneth G. Lake submitted herewith; on the pleadings and  
10 records on file herein, and on such other matters as may be presented at the hearing.

11 Dated: March 23, 2021

Respectfully Submitted,

12 MATTHEW RODRIQUEZ  
13 ACTING ATTORNEY GENERAL  
14 BENJAMIN BARNOUW  
15 Supervising Deputy Attorney General



16 KENNETH G. LAKE  
17 Deputy Attorney General  
18 *Attorneys for Defendants and Respondents  
State of California, acting by and through  
the California Department of Justice and  
Former Attorney General Xavier Becerra*

19 \* \* \* \* \*

20 **DEMURRER TO THE SECOND AMENDED COMPLAINT AND PETITION**

21 Defendants and Respondents State of California, acting by and through the California  
22 Department of Justice and Former Attorney General Xavier Becerra hereby demur to the Second  
23 Amended Complaint and Petition on the following grounds:

24 **Demurrer to First Cause of Action**

25 1. The First cause of action fails to state facts sufficient to constitute a cause of action.  
26 (Code Civ. Proc., §430.10, subd. (e).)

1                   **Demurrer to Second Cause of Action**

2                   2. The Second cause of action fails to state facts sufficient to constitute a cause of action.  
3 (Code Civ. Proc., §§430.10, subd. (e))

4                   **Demurrer to Eighth Cause of Action**

5                   3. The Eighth cause of action fails to state facts sufficient to constitute a cause of action.  
6 (Code Civ. Proc., §§430.10, subd. (e).)

7                   Dated: March 23, 2021

Respectfully Submitted,

8                   MATTHEW RODRIQUEZ  
9                   ACTING ATTORNEY GENERAL  
10                   BENJAMIN BARNOUW  
11                   Supervising Deputy Attorney General



12                   KENNETH G. LAKE  
13                   Deputy Attorney General  
14                   *Attorneys for Defendants and Respondents  
State of California, acting by and through  
the California Department of Justice and  
Former Attorney General Xavier Becerra*

15                   \* \* \* \* \*

16                   **DECLARATION OF KENNETH G. LAKE**

17                   I, Kenneth G. Lake, declare:

18                   1. I am an attorney at law duly authorized to practice in the State of California. I am a  
19                   Deputy Attorney General assigned to handle this matter on behalf of Defendants and  
20                   Respondents.  
21                   2. On March 15, 2021, Supervising Deputy Attorney General Benjamin Barnouw and I met  
22                   and conferred by telephone with counsel for plaintiffs and petitioners Franklin Armory, Inc. and  
23                   the California Rifle and Pistol Association, regarding the intention of the California Department  
24                   of Justice and Former Attorney General Xavier Becerra to file a Demurrer to the First, Second  
25                   and Third causes of action.

1 and Eighth causes of action in the Second Amended Complaint and Petition. The parties did not  
2 reach an agreement resolving the objections raised in the Demurrer.

3 I declare under penalty of perjury under the laws of the State of California that the  
4 foregoing is true and correct. Executed on March 23, 2021.

5   
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7 KENNETH G. LAKE  
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**DECLARATION OF SERVICE BY ELECTRONIC MAIL**

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

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

**NOTICE OF DEMURRER AND DEMURRER TO THE FIRST, SECOND AND  
EIGHTH CAUSES OF ACTION TO THE SECOND AMENDED COMPLAINT AND  
PETITION; MEMORANDUM OF POINTS AND AUTHORITIES AND  
DECLARATION OF KENNETH G. LAKE IN SUPPORT THEREOF**

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*Attorneys for Plaintiffs-Petitioners*

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

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

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

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

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

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

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

Sandra Dominguez  
Declarant

/s/ Sandra Dominguez  
Signature

1 MATTHEW RODRIQUEZ  
2 Acting Attorney General of California  
3 BENJAMIN BARNOUW  
4 Supervising Deputy Attorneys General  
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*California, acting by and through the California*  
*Department of Justice and Former*  
9 *Attorney General Xavier Becerra*

10  
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF LOS ANGELES  
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14  
15 **FRANKLIN ARMORY, INC. AND**  
**CALIFORNIA RIFLE & PISTOL**  
**ASSOCIATION, INCORPORATED,**

16 Petitioners-Plaintiffs,  
17  
18 v.

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

21 Respondents-Defendants.  
22  
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Case No. 20STCP01747

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

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

Honorable James C. Chalfant

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1      **I. Introduction**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 <sup>1</sup> The rimfire model, or variant, was not mentioned in the FAC.  
28 <sup>2</sup> Paragraphs 58-59 in the SAC were paragraphs 55-56 in the FAC. Paragraph 118 is the  
same in both the SAC and the FAC.

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

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

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

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

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

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

13 **IV. Argument**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 \_\_\_\_\_  
25 <sup>4</sup> A demurrer, as opposed to a motion to strike, is the appropriate procedural tool to utilize  
26 in this situation. First, in *Coachella Valley Unified School Dist.*, the trial court disposed of the  
27 declaratory relief cause of action by way of a motion for judgment on the pleadings. (*Coachella*  
28 *Valley Unified School Dist.*, *supra*, 176 Cal.App.4th at p. 112.) Second, a demurrer is appropriate  
“irrelevant, false or improper” matters. (Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter  
Group 2021), §§ 7:156, 7:177 [quoting Civ. Proc., § 436(a)].)

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

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

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

18 **V. Conclusion**

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

21 Dated: March 23, 2021

22 Respectfully Submitted,

23 

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

27  
28

**DECLARATION OF SERVICE BY ELECTRONIC MAIL**

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

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

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

Anna M. Barvir  
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*Attorneys for Plaintiffs-Petitioners*

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

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

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

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

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

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

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

Sandra Dominguez  
Declarant

/s/ Sandra Dominguez  
Signature

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11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF LOS ANGELES

14 FRANKLIN ARMORY, INC. and  
15 CALIFORNIA RIFLE & PISTOL  
16 ASSOCIATION, INCORPORATED

17 Petitioners-Plaintiffs,

18 v.

19 CALIFORNIA DEPARTMENT OF JUSTICE,  
20 XAVIER BECERRA, in his official capacity  
21 as Attorney General for the State of California,  
22 and DOES 1-10,

23 Respondents-Defendants.

24 Case No. 20STCP01747

25 **PLAINTIFFS AND PETITIONERS'**  
26 **MEMORANDUM OF POINTS AND**  
27 **AUTHORITIES IN OPPOSITION TO**  
28 **RESPONDENTS' DEMURRER**

29 Date: June 3, 2021

30 Time: 9:30 a.m.

31 Dept.: 85

32 Judge: Hon. James C. Chalfant

33 Action Filed: May 27, 2020

34 Trial Date: Not set

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## INTRODUCTION

2       Despite the clarity of this case as pleaded in the Second Amended Complaint & Petition for Writ  
3 of Mandate (SAC), the Respondents Department of Justice and Attorney General Becerra (collectively,  
4 DOJ) attack this suit via demurrer—again—on grounds it should have brought during its first bite at the  
5 apple or that it already did bring. First, the DOJ claims it has no ministerial duty to update the DES.  
6 Second, it argues that the configuration of the DES is not a “regulation” subject to the Administrative  
7 Procedure Act (APA) because the DES is an electronic web-based system, not a rule, order, or standard.  
8 Both defenses were equally available to the DOJ when it brought its demurrer to the First Amended  
9 Complaint, but the DOJ chose not to then pursue them. The balance of the DOJ’s motion is essentially a  
10 rehashing of the same justiciability arguments on which Petitioners ostensibly prevailed when the Court  
11 sustained the first demurrer with leave to amend. Thus, the demurrer seems less like a good faith attempt  
12 to narrow the issues for this Court and more like a stalling tactic, which, incidentally, is the sort of  
13 conduct that led Petitioners to sue in the first place. The DOJ’s demurrer should be overruled in its  
14 entirety. But if the Court sustains any part of it, Petitioners request leave to amend.

## STATEMENT OF FACTS

## **I. CALIFORNIA'S SCHEME FOR THE TRANSFER AND REGISTRATION OF FIREARMS THROUGH THE DEALER RECORD OF SALE ENTRY SYSTEM**

17 California has reserved the entire field of licensing and registration of firearms to itself. (SAC ¶  
18 34, citing Pen. Code, § 53071.) Under state law, “every dealer shall keep a register or record of electronic  
19 or telephonic transfer in which shall be entered” certain information relating to the transfer of firearms.  
20 (SAC ¶ 43.1, quoting Pen. Code, § 28100.) “For all firearms,” this record, called the Dealer Record of  
21 Sale (DROS), must the include the “type of firearm.” (SAC ¶ 44.14, quoting Pen Code, § 28160.)

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 to the DOJ the information required for each firearm transfer. (SAC ¶ 54.)

1        As designed, the DES can facilitate the transfer of certain firearms, including “handguns” (also  
2        called “pistols” or “revolvers”), “rifles,” and “shotguns.” Many firearms, however, do not qualify as  
3        “handguns,” “pistols,” “revolvers,” “rifles,” or “shotguns” as those terms are defined by statute. (SAC ¶¶  
4        22-26.) These include Franklin Armory’s Title 1 series of firearms, including both rimfire and centerfire  
5        variants, all buntline revolvers with a barrel length of 16 or more inches, butterfly grip firearms, and  
6        barreled action firearms without stocks. (SAC ¶¶ 27-32.) But the DES menu for selecting a firearm  
7        subtype has no way to capture these undefined firearm subtypes.<sup>1</sup> (SAC ¶¶ 58.) As such, dealers cannot  
8        accurately submit the required information for these firearms through the DES. (SAC ¶ 59.) Thus, they  
9        cannot process and accept applications from purchasers of undefined firearm subtypes. (SAC ¶¶ 58-59,  
10        62.) What’s more, the DOJ has refused to offer another way to transmit the required information, even  
11        though section 28205, subdivision (c), authorizes it to do so. (SAC ¶ 60.) By design then, the DOJ has  
12        instituted a technological barrier that functions to prohibit the transfer of all firearms that are “long guns”  
13        but are not “rifles,” “shotguns,” or “rifle/shotgun combinations” through a licensed retailer. (SAC ¶ 63.)

14        The DOJ has long known about this deficiency but has refused requests to correct it. (SAC ¶ 67.)  
15        Franklin Armory informed the DOJ of the defect and the resulting inability to transfer Title 1s in October  
16        2019. (SAC ¶¶ 68-69, Ex. C.) It has been more than a year and a half since Petitioners so notified the  
17        DOJ, yet the agency has refused to modify the DES even though it has proven it can quickly make the  
18        change. (SAC ¶ 70.) Nor has the DOJ offered alternate means to submit the information. (SAC ¶ 70.)

19 **II. PROCEDURAL HISTORY**

20        Franklin Armory, a manufacturer of a series of firearms that are neither “rifles,” nor “pistols,” nor  
21        “shotguns” and which are designated with the model name “Title 1,” learned that it cannot transfer its  
22        Title 1 firearms because of the design of the DES, which is maintained and controlled by the DOJ. (SAC  
23        ¶¶ 2, 57-63.) California Rifle and Pistol Association (CRPA) is an association whose members wish to  
24        purchase or transfer undefined firearms subtypes, including Title 1 firearms, buntlines, butterfly grip  
25        firearms, and barreled action firearms without stocks, but are blocked from completing and submitting  
26        their applications for the lawful transfer of said firearms because of the DOJ’s policy barring such

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28        <sup>1</sup> Firearms that are not “handguns,” “pistols,” “revolvers,” “rifles,” or “shotguns” (or “frames” or  
“receivers” for such firearms) are called “undefined firearm subtypes” throughout this brief.

1 transfers, which is carried out through the defective design of the DES. (SAC ¶ 6.)

2 Petitioners sued, alleging several causes of action, including a petition for writ of mandate  
3 directing the DOJ to correct the technological defect of the DES that bars the transfer of otherwise lawful  
4 undefined firearm subtypes, including Title 1 firearms, or authorize other ways to transmit the required  
5 information pursuant to its authority under section 28205. (Compl. ¶¶ 123-129.) In August 2020,  
6 Petitioners filed a First Amended Complaint (FAC), adding four claims—some related to changes in state  
7 law affecting their claims. (FAC ¶¶ 163-202.) The Court stayed all but the First, Second, and Eighth  
8 Causes of Action. (Oct. 15, 2020 Tr. Setting Conf. Order.)

9 Following the filing of the FAC, the DOJ demurred to three of the unstayed claims. In a decision  
10 sustaining the demurrer, the Court ruled that Petitioners could not succeed on their claims—at least as  
11 related the transfer of *centerfire* Title 1 firearms for which deposits had been made. (Decision on Dem.  
12 (Dem. Dec.), Jan. 28, 2021, p. 9.) The Court held that, because the deadline by which to take possession  
13 of such firearms to register them as “assault weapons” passed in September 2020, the Court lacks  
14 authority to direct the DOJ to facilitate the transfer of such firearms, rendering the case both moot and  
15 unripe, and leaving Petitioners without standing to pursue their claims. (*Id.* at pp. 5-8.) Satisfied,  
16 however, that Petitioners could allege that Franklin Armory manufactures rimfire Title 1s that are not  
17 “assault weapons” and that CRPA represents the interests of members who wish to purchase undefined  
18 firearm subtypes, the Court granted Petitioners leave to amend. (Hrg. Tr., Jan. 28, 2021, p. 8:21.)

19 Petitioners timely filed a SAC, alleging that countless firearms, including the rimfire Title 1,  
20 buntlines, butterfly grip firearms, and barreled action firearms without a stock, remain legal but cannot be  
21 transferred due to the DOJ’s policy of barring the transfer of undefined firearm subtypes. (SAC ¶¶ 27-32,  
22 57-63.) And in line with its representations at the demurrer hearing (Hrg. Tr., pp. 10:13-14:13),  
23 Petitioners clarified that the Court should issue a writ directing DOJ to stop blocking the transfer of  
24 centerfire Title 1 firearms for which deposits had been made for two reasons.<sup>2</sup> First, because those who  
25 had placed a deposit on a centerfire Title 1 would have taken legal possession of their firearms before  
26 September 2020 *but for* the DOJ’s own illicit conduct. (SAC ¶ 123.a.) And second, because DOJ’s

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2 Petitioners kept this claim in the SAC to avoid waiving any right to appeal the Court’s ruling. But  
they concede that the Court has already ruled on the issue in its order sustaining the first demurrer (CMC

1 conduct violated the due process rights of Petitioners, as well as their customers, members, and  
2 supporters. (SAC ¶ 123.b.) The SAC also clarifies the basis of the declaratory relief claims, as well as its  
3 APA claim. (SAC ¶¶ 115-120, 185-197.) In response to the SAC, the DOJ brought yet another demurrer.

4 **ARGUMENT**

5 **I. LEGAL STANDARD**

6 A civil complaint is merely intended to frame and limit the issues and apprise the defendant of the  
7 basis on which the plaintiff seeks recovery. (See *Fuentes v. Tucker* (1947) 31 Cal.2d 1, 4; *Perkins v.*  
8 *Super. Ct. (Gen. Tel. Directory Co.)* (1981) 117 Cal.App.3d 1, 6.) Thus, “[a]ll that is necessary against a  
9 general demurrer is that, upon a consideration of all the facts stated, it appears that the plaintiff is entitled  
10 to any relief at the hands of the court against the defendant.” (*Hilltop Props., Inc. v. State* (1965) 233  
11 Cal.App.2d 349, 354.) A pleading is adequate if it contains enough facts to apprise the defendant of the  
12 factual basis for the plaintiff’s claim. (*McKell v. Wash. Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1469-  
13 1470.) What’s more, on demurrer, courts read the allegations liberally and in context. (*Taylor v. City of*  
14 *L.A. Dept. of Water and Power* (2006) 144 Cal.App.4th 1216, 1228.) And if there is more than one  
15 reasonable interpretation, courts are to draw any “inferences favorable to the plaintiff.” (*Perez v. Golden*  
16 *Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238.)

17 **II. THE COURT SHOULD OVERRULE THE DOJ’S DEMURRER TO THE SECOND CAUSE OF ACTION  
FOR WRIT OF MANDATE**

18 **A. Petitioners Have Standing to Pursue a Writ of Mandate**

19 Standing in California courts is less rigid than in the federal forum. Unlike federal Article III  
20 standing, standing in California is not a jurisdictional prerequisite. Indeed, “our state Constitution has no  
21 case or controversy requirement imposing an independent jurisdictional limitation on our standing  
22 doctrine.” (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248 (*Weatherford*.)) Despite  
23 this more prudential standard, familiar notions of standing requirements do apply. To seek writ relief, a  
24 party must be “beneficially interested” in the subject of the action. (Code Civ. Proc, § 1086.) That is, they  
25 must have “some special interest to be served or some particular right to be preserved or protected over  
26 and above the interest held in common with the public at large.” (*Assoc. Builders & Contractors, Inc. v.*  
27 *S.F. Airports Commn.* (1999) 21 Cal.4th 352, 361-362.) Stated simply, if a party pleads a non-

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28 Hrg. Tr., Feb. 25, 2021, at pp. 6:12-7:11), so the parties have agreed not to relitigate the issue.

1 hypothetical injury traced to a defendant's conduct, "beneficial interest" writ standing is satisfied. (See  
2 *Teal v. Super. Ct.* (2014) 60 Cal.4th 595, 599.)

3 Courts do not, however, hold litigants to strict compliance with the requirement of "beneficial  
4 right" standing where "the question is one of public right and the object of the mandamus is to procure  
5 the enforcement of a public duty." (Weatherford, *supra*, 2 Cal.5th at pp. 1247-1248, internal quotation  
6 omitted.) "This exception . . . protects citizens' opportunity to 'ensure that no governmental body impairs  
7 or defeats the purpose of legislation establishing a public right.'" (*Ibid.*, quoting *Green v. Obledo* (1981)  
8 29 Cal.3d 126, 144 (*Green*)).

9 To defeat the DOJ's second demurrer, Petitioners have met the minimal pleading requirements  
10 necessary to establish standing to pursue writ relief. Indeed, as explained below, the SAC alleges enough  
11 facts to establish both "beneficial right" and "public interest" standing. (See *Cty. of Santa Clara v. Super.*  
12 *Ct. (Naymark)* 171 Cal.App.4th 119, 126 "[I]f the pleadings contain 'sufficient particularity and  
13 precision to acquaint the defendants with then nature, source and extent of [the] cause of action' the  
14 general demurrer should be overruled. [Citation omitted.]".) The Court should overrule the DOJ's  
15 second demurrer on this ground.

16 **1. Petitioners Clearly Allege a Beneficial Right**

17 Petitioners sufficiently allege facts showing that Petitioners, their customers, and members have  
18 suffered or will suffer an injury due to the alleged limitations of the DES. (See e.g., SAC ¶¶ 1-6, 22-33,  
19 51-63, 79, 98-102, 124.) They allege that Franklin Armory manufactures a rimfire variant of its Title 1  
20 firearm chambered in .17 WSM that it cannot transfer in California because of the DOJ's alleged  
21 misconduct. (SAC ¶¶ 2, 62.) They also allege that CRPA represents the interests of its members

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

25 (SAC ¶ 6.) Denial of those firearms has caused Petitioners, their customers, and members to be denied  
26 their right to transfer and acquire lawful firearms and will cause Franklin Armory great financial injury  
27 because of lost sales. (SAC ¶ 79.) These allegations are enough to demonstrate "a non-hypothetical injury  
28 traced to a defendant's conduct." (See *ibid.*) Still, the DOJ calls Petitioners' standing into question,

1 raising a series of dubious claims about the specificity of the SAC.

2 First, the DOJ quibbles over Petitioners' perceived failure to "allege any specific component of  
3 the Title 1 rimfire model which establishes why it is not a handgun, rifle, or shotgun." (Dem., p. 12.) The  
4 argument borders on the frivolous. The SAC expressly alleges that Title 1 firearms, *which include the .17*  
5 *WSM rimfire variant*, are " 'firearms with an undefined subtype,' as its overall design renders the device  
6 to be a 'firearm,' but not a 'handgun,' nor a 'rifle,' nor a 'shotgun,' as those terms are defined by  
7 California law." (SAC ¶¶ 2, 27.) Under the liberal pleading standard applicable at this stage, Petitioners  
8 need not allege the very specific features of the firearm that make it so. The DOJ is clearly on notice of  
9 Petitioners' claims. Indeed, as the SAC alleges, the DOJ has known the specific characteristics of the  
10 Title 1 series of firearms since at least 2012. (SAC ¶¶ 33, 68.)<sup>3</sup> What's more, Petitioners would not have  
11 incurred the great expense of suing the government if the firearms at issue were not undefined firearm  
12 subtypes. So, to the extent *more* is needed, Petitioners can surely amend to allege it. Indeed, they would  
13 amend to state that:

14 (1) All Title 1 series firearms, including both centerfire and rimfire variants, are not **rifles**  
15 because they are not "a weapon designed or redesigned, made or remade, and intended  
16 to be fired from the shoulder." (Pen. Code, § 17090.) They are designed, intended, and  
made to fire away from the shoulder, and they are not equipped with a stock from  
which to fire the firearm from the shoulder.

17 (2) All Title 1 firearms, including both centerfire and rimfire variants, are not **shotguns**  
18 because they are not "designed or redesigned, made or remade, and intended to be fired  
19 from the shoulder and designed or redesigned and made or remade to use the energy of  
the explosive in a fixed shotgun shell." (Pen. Code, § 17190.) They are designed,  
intended, and made to fire single projectile cartridge-based ammunition.

20 (3) All Title 1 firearms, including both centerfire and rimfire variant, are not **handguns**  
21 because they all are designed, intended, and made to have a barrel of 16 inches in  
length. (Pen. Code, §§ 16640, 16530; 11 CCR section 5471(y).)

22 Second, as to buntline revolvers, butterfly grip firearms, and barreled action firearms without  
23 stocks, the DOJ claims that "Petitioners disregarded the Court's order that, '[they] must plead specific  
24 models to show standing, by adding to the SAC three categories or types of firearms, not specific  
25 models.' (Dem., p. 12.) The DOJ mischaracterizes the SAC. At paragraph 30, the SAC identifies the  
26 Browning 1919 A4 firearms, including the Browning .30 Cal. M-1919 A4 (SAC ¶ 30 & Ex. A) and the

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<sup>3</sup> The rimfire Title 1 has all the same characteristics that make the centerfire Title 1 a firearm with an undefined subtype, but the DOJ did not object in its first demurrer to any perceived failure to allege

1 Browning .50 Cal. M2 semiautomatic rifles configured with a pistol grip or butterfly grip (SAC ¶ 31 &  
2 Ex. B). Paragraph 31 identifies the U.S. Ordinance Semi-60 configured with a butterfly grip. Paragraph  
3 32 alleges that “barreled action firearms sold or configured without a stock are ‘firearms with an  
4 undefined subtype,’ and that “[s]uch firearms are currently sold nationwide.” “A simple search of one  
5 online retailer...for ‘barreled receivers’ returns dozens of barreled action firearms currently available for  
6 sale that would constitute ‘firearms with an undefined subtype’ (and not bare receivers) that cannot  
7 lawfully be transferred through DES as it is currently configured.” (SAC ¶ 32.)<sup>4</sup> What’s more, as  
8 Petitioners represented at the hearing on the DOJ’s first demurrer, Franklin Armory’s responses to  
9 discovery identify by make and model dozens of examples of buntlines, butterfly grip firearms, and  
10 barreled action firearms without stocks that are undefined firearm subtypes that cannot be transferred  
11 through DES. (Ex. A, pp. 12-15.) A complaint is meant to put the opposing party on “fair notice” of the  
12 pleaded claim. (See *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1238-1239.) The DOJ has been adequately  
13 apprised of Petitioners’ claims to prepare a defense; its demurrer on this ground should not be sustained.

14 Third, the DOJ claims—again—that “Petitioners do not have standing because the SAC does not  
15 allege that anyone actually attempted to purchase, sell or transfer a Title 1 rimfire model or any firearm in  
16 the Buntline revolver, butterfly grip or barreled action categories.” (Dem., p. 13.) But, as the DOJ  
17 concedes, the SAC expressly alleges that:

18 Ryan Fellows, a member of [CRPA], “seeks to acquire” a Title 1 rimfire model but is  
19 unable to do so because of defendants’ conduct. (SAC at ¶ 99.) The SAC alleges that  
20 Beverly Epidendio, also [a CRPA] member, “seeks to acquire” a buntline revolver but is  
21 prohibited from doing so because of defendants’ conduct. (SAC at ¶ 100.) The SAC  
alleges that Coyote Point Armory, a licensed firearms dealer, “seeks to sell” a buntline  
revolver and other lawful firearms including but not limited to the Title 1 rimfire model  
but is prohibited from doing so due to defendants’ conduct. (SAC at ¶ 101.)  
(Dem., p. 13.) These are but mere examples of the concrete interests that Petitioners and their *thousands*  
of customers and members have in this action. Petitioners need allege no more at this stage.

22 But to the extent that the DOJ is *again* claiming that Petitioners’ petition must identify specific  
23 individuals that have taken more affirmative steps toward the purchase of the subject firearms, like  
24 submitting an *improper* application for the transfer of an undefined firearm subtype through the DES, it is  
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26 specific characteristics that make centerfire Title 1s undefined firearm subtypes.  
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<sup>4</sup> If necessary, Petitioners could easily amend to list those dozens of firearms by name in the

1 simply wrong. “The law does not require useless acts from litigants as prerequisites to seeking relief from  
2 the courts.” (*Van Gammeren v. City of Fresno* (1942) 51 Cal.App.2d 235, 240; see also *Doster v. Cty. of*  
3 *San Diego* (1988) 203 Cal.App.3d 257, 262 [the law does not require “futile acts”].) Here, “[b]ecause  
4 dealers cannot accurately submit the required information through the DES for ‘long guns’ that are  
5 undefined ‘firearm’ subtypes, they are prohibited from processing and accepting applications from  
6 purchasers of said firearms.” (FAC ¶ 59, citing Penal Code, § 28215, subd. (b).) “The background check  
7 begins with the *completion* and *submission* of an application form that the gun dealer electronically  
8 submits to the California DOJ.” (*Silvester v. Harris* (9th Cir. 2016) 843 F.3d 816, 825, *italics added*.)  
9 Thus, the very first step in “attempting to purchase” a firearm is to apply with the dealer, which is futile  
10 given that “under California Code of Regulations, title 11, § 4210, subdivision (b)(2)(6), **firearm dealers**  
11 **are prohibited from entering inaccurate information within the [DES]**.” (FAC ¶¶ 52-58, *emphasis*  
12 added.) Any attempt to complete an application would thus be futile, an idle gesture, or violate state law.

13 Notably, the DOJ does *not* argue that the transfer of firearms that are neither “handguns,” nor  
14 “long guns,” nor “shotguns” *can* be facilitated through the DES despite Petitioners’ claims. Instead, it  
15 suggests that if a retailer submits a false DROS in violation of state law, it *might not* reject the record and  
16 halt the transfer. (Dem., pp. 11-13.) The argument is illogical. Petitioners need not rely on the willingness  
17 of third parties to violate the law and risk civil or criminal penalty, including the loss of their licenses, to  
18 have standing. It is enough that firearm retailers, including Coyote Point Armory (SAC ¶¶ 98, 101) and  
19 others (SAC Ex. C at p. 3), will not transfer these firearms because they cannot submit an accurate DROS  
20 because of the technological limitations of DES.

21 **2. Petitioners Also Have Public Interest Standing**

22 Independent of their standing as a beneficially interested party, Petitioners also have standing  
23 because this case deals with an important question of a public right. When, as here, the question is one of  
24 public right and the object of the mandamus is to procure the enforcement of a public duty, the petitioner  
25 need not show that he has any legal or special interest in the result, since it is enough that the Petitioner is  
26 interested as a citizen in having the laws executed and that duty enforced. (*Save the Plastic Bag Coal. v.*  
27 *City of Manhattan Beach* (2011) 52 Cal.4th 155, 166, citing *Bd. of Soc. Welfare v. County of L.A.* (1945)

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28 complaint, but under the pleading standard applicable at this stage Petitioners hardly think it is.

1 27 Cal.2d 98, 100-101.) “The exception promotes the policy of guaranteeing citizens the opportunity to  
2 ensure that no governmental body impairs or defeats the purpose of legislation establishing a public  
3 right.” (*Green, supra*, 29 Cal.3d 126, 144.)

4 Here, the public has an expressly protected right to purchase firearms that are not illegal. Through  
5 its failure to design and maintain the DES to facilitate the lawful submission of information regarding the  
6 transfer of undefined firearm subtypes, the DOJ impaired Petitioners (and all members of the public)  
7 from exercising this right, effectively banning undefined firearm subtypes. (SAC ¶¶ 51-63.) This was  
8 done without authority or public notice. (SAC ¶¶ 44-46, 93). When the government acts, as it has here, in  
9 flagrant disregard of its constitutional and statutory duties, public interest standing exists. (*People for*  
10 *Ethical Operat. of Prosecs. v. Spitzer* (2020) 53 Cal.App.5th 391, 410 (*People for Ethical Operation*)).

11 For instance, in *People for Ethical Operation*, plaintiffs sought writ relief to prohibit the operation  
12 of an alleged unlawful confidential informant program. (53 Cal.App.5th at p. 396.) The court held that  
13 plaintiffs had standing because the petition described a surveillance program in blatant disregard of the  
14 government’s constitutional duties and limitations. (*Id.* at p. 410-411.) The rights the program allegedly  
15 violated—the rights to due process and assistance of counsel—“are public rights that every citizen has an  
16 interest in upholding.” (*Id.* at p. 410.) Here, through its inaction, the DOJ denied both Petitioners and the  
17 broader public their rights under the Due Process Clause and the Second Amendment, as well as rights in  
18 property they could otherwise lawfully acquire. (SAC ¶ 114.) These are constitutional rights every citizen  
19 has an interest in and which the government must uphold. The existence of “public interest” standing  
20 could hardly be clearer.

21 In sustaining the DOJ’s first demurrer, the Court expressed concern that Petitioners were not  
22 pursuing this action in the public interest, but to pursue Franklin Armory’s personal financial interest in  
23 its Title 1 firearms. (Dem. Dec., p. 8.) But the Court’s concern was rooted in the misconception that no  
24 firearm except the Franklin Armory’s centerfire Title 1 was affected by the alleged DES defect. (*Ibid.*  
25 “[T]his matter concerns only a narrow category of undefined type firearms, of which the Title 1 is the  
26 only firearm actually identified in the FAC.”).) And, after SB 118, that firearm could no longer be  
27 transferred, mooting Petitioners’ claims anyway. Regardless of the vital public rights and government  
28 duties at issue, the Court (not unreasonably) seemed reluctant to confer standing if no other firearm was

1 affected. (*Ibid.*) But the Court did not know that countless other firearms cannot be transferred due to the  
2 DES defect. The SAC clarifies that fact. (SAC ¶¶ 27-32.) Petitioners have public interest standing.

3 **B. Petitioners' Claim Is Ripe for Adjudication**

4 The DOJ raises no independent argument that this case is not ripe except for those arguments  
5 supporting its claim that Petitioners lack standing. So, to borrow the DOJ's words, "the above discussion  
6 regarding standing also shows that the issues alleged in the SAC" *are* ripe for adjudication. (Dem., p.  
7 15.) That discussion, *supra* Part II.A.1-2, is incorporated here.

8 **C. DOJ Has a Clear Ministerial Duty to Maintain the DES in a Manner that Does Not  
9 Block the Transfer of Legal Firearms**

10 "A ministerial act is an act that a public officer is required to perform in a prescribed manner in  
11 obedience to the mandate of legal authority and without regard to his own judgment or opinion  
12 concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the  
13 other hand, is the power conferred on public functionaries to act officially according to the dictates of  
14 their own judgment." (*Cty. of L.A. v. City of L.A.* (2013) 214 Cal.App.4th 643, 653-654.) Here, state law  
15 creates a ministerial duty that the DOJ maintain the DES so that *all* legal firearms may be transferred  
16 through the system. (Pen. Code, §§ 28155, 28205, 28215, 28220.) While the *form* of the record is  
17 created by the DOJ (§ 28155), the code does not convey to the DOJ any discretion to prohibit the lawful  
18 sale of firearms to law-abiding Californians. If it did, the DOJ would have the unfettered power to block  
19 the sale of any legal firearm it chooses—or all firearms for that matter—by sabotaging the DES and  
20 claiming it is within its discretion to do so.

21 But the Penal Code commands that "for **all** firearms, the register or record of electronic transfer  
22 **shall** include **all** of the following information . . ." (Pen. Code, § 28160, subd. (a), bold added.) The code  
23 then lists several items that the record of electronic transfer "shall" include, including the "[t]ype of  
24 firearm." (Pen. Code, § 28160, subd. (a)(14).) By refusing to correct the DES to facilitate the transfer of  
25 undefined firearm subtypes, including rimfire Title 1 firearms, buntline revolvers, butterfly grip firearms,  
26 and barreled action firearms without stocks, the DOJ violates its duty to create a system that allows  
27 firearm retailers to include, for *all* firearms, all the statutorily required information. And, in the past, the  
28 DOJ seems to have understood its mandatory duty to facilitate the electronic submission of DROS

1 information to DOJ through DES. Indeed, in a letter to the Office of Administrative Law in November  
2 2013, the DOJ admitted that “[t]he legal sale of firearms in California is only available via DES” and that  
3 DOJ would assume the duty of maintaining the DES on January 1, 2014. (SAC, ¶ 83, Ex. D, p. 1.)

4 The DOJ’s second demurrer raises, for the first time, an argument that Petitioners are not entitled  
5 to a writ of mandate because the DOJ has discretion over the DES. (Dem., pp. 16-17.) The DOJ attempts  
6 to transform language in the Penal Code (which confers some discretion over the *form* of the DES) into a  
7 blank check that allows it to block sales of any firearm it desires by simply not including the required  
8 fields in the DES. The argument is based on the principal that mandamus will not issue if the duty is  
9 mixed with discretionary power. (*Id.*, p. 16.) While that general principle is correct, it usually requires the  
10 exercise of “*significant* discretion”: A “duty is discretionary if the [entity] must exercise *significant*  
11 discretion to perform the duty. We examine the entire statutory scheme to determine whether the [entity]  
12 must exercise *significant* discretion to perform a duty.” (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229,  
13 233, *italics added*.) The DOJ has not shown—that state law gives it “*significant discretion*” over the  
14 substance of the DES. Instead, the DOJ gives just two examples of its discretionary power over its *form*.

15 **First**, the DOJ points to statutory language allowing the DOJ to authorize other means of transfer  
16 (Dem., p. 16): “On or after January 1, 2003, *except as permitted by the [DOJ]*, electronic transfer shall be  
17 the exclusive means by which information is transmitted to the [DOJ]. Telephonic transfer shall not be  
18 permitted for information regarding sales of any firearms.” (Pen. Code, § 28205, subd. (c).) In context,  
19 that language plainly does not grant the DOJ any authority to effectively block otherwise legal firearm  
20 transactions. It merely allows the DOJ to provide alternative means for transmitting the required  
21 information. Discretion only as to the *method* of transmission of information is the extent of the authority  
22 granted to the DOJ by section 28205, subdivision (c), which the DOJ implicitly admits in its brief. (Dem.,  
23 pp. 16-17 [“This statute does not specify how the DES should be set up or operated. *Instead, it provides*  
24 *the DOJ with discretion to utilize the DES or another method.*”].) This cannot be considered significant  
25 discretion to block the transmission of statutorily required information altogether.

26 Nor does *State of California ex rel. Dept. of Rehabilitation* (1982) 137 Cal.App.3d 282 support  
27 the DOJ’s position as it insists it does. (Dem., p. 16.) While subsequent language in that case did modify  
28 the Attorney General’s duty to see that the laws of the State are adequately enforced, that language,

1 which the DOJ left out of its brief, states: “Whenever in the opinion of the Attorney General any law of  
2 the State is not being adequately enforced in any county...” (Cal Const, art. V § 13.) That language led  
3 the court to hold that the duty was discretionary because it hinged on the Attorney General’s subjective  
4 opinion. (*State of Cal.*, *supra*, 137 Cal.App.3d at p. 287.) Section 28205 does not confer such broad  
5 discretion; it merely allows the DOJ to sometimes make exceptions to the rule that electronic transfer is  
6 the only way the required information is transmitted. So, while the DOJ might offer variances to how the  
7 information is transmitted, *it must always provide some way to transmit it.*

8 **Second**, the DOJ looks to section 28155, which allows the DOJ to prescribe the form of the  
9 register and record of electronic transfer. (Dem., p. 17.) While the law does “confer[] discretionary  
10 authority upon the DOJ to prescribe the *format* of the DES,” (*id.*, italics added), the DOJ lacks authority  
11 to block the transmission of statutorily required information by refusing to correct the known DES defect  
12 or to provide alternative means for its transmission. The conveyance of some discretionary authority in  
13 the method of executing a mandatory duty does not give blanket power to ignore that duty altogether.  
14 Indeed, “[i]t would be difficult to conceive of any official act, no matter how directly ministerial, that did  
15 not admit of some discretion in the manner of its performance, even if it involved only the driving of a  
16 nail...To the extent that its performance is unqualifiedly required, it is not discretionary, even though the  
17 manner of its performance may be discretionary.” (*Ham v. Cty. of L.A.* (1920) 46 Cal.App. 148, 162.)

18 In *Ham v. County of Los Angeles*, a case about a duty to repair streets and highways, the court  
19 held there was a duty for street superintendents and road supervisors to complete their ministerial duty to  
20 repair roads when on notice that repairs were needed. (46 Cal.App. at p. 162.) That example is very  
21 useful here. While the public servants in *Ham* may have had significant discretion in the manner of  
22 repairing the streets, what they could not do was refuse to repair a street they knew needed repair. In the  
23 same way, the DOJ cannot block the required submission of information about the transfer of any legal  
24 firearm even though it can decide on the form the DES takes. The DOJ’s position would rewrite *Ham* to  
25 say there was no duty for the road supervisors to repair a particular street so long as they have discretion  
26 to decide on the *methods* of street repair. Such an absurdity cannot be correct.

27 **Third**, the DOJ cites *AIDS Healthcare Foundation* to argue that mandamus can only compel a  
28 public agency to exercise its discretion in some manner, but not any particular manner. (Dem., pp. 17-

1 18.) But Petitioners do not ask this Court to direct the manner in which DOJ collects the required firearm  
2 transfer information. The DOJ can use its limited discretion to put the DES into any form it chooses, so  
3 long as it meets section 28160's mandate that "for *all* firearms" the record of electronic transfer "shall  
4 include," among other things, "the type of firearm." (Pen. Code, § 28160, subd. (a)(14), italics added.) To  
5 refer to *Ham* again, the DOJ is free to choose how it wants to fix this "road," but it must fix it.

6 Even if the Court were to find that the DOJ had significant discretion over the DES beyond just  
7 its form, the DOJ should still be compelled to facilitate the sale of legal undefined firearm subtypes.  
8 "Where only one choice can be a reasonable exercise of discretion, a court may compel an official to  
9 make that choice." (*Cal. Correct. Supervs. Org. v. Dept. of Corr.* (2002) 96 Cal.App.4th 824, 827.) There  
10 is a single reasonable choice here. And that is the one that facilitates the transfer of required information  
11 to the DOJ, as mandated by the Penal Code, so that legal firearm sales can be lawfully completed. If the  
12 DOJ's interpretation of the Penal Code were correct, it could block any firearm transaction it chooses by  
13 deleting options for "disfavored" types of firearms from the DES, and then not providing for any other  
14 means to transmit the statutorily required information. Such an interpretation is patently unreasonable.

15 **III. THE COURT SHOULD OVERRULE THE DOJ'S DEMURRER TO THE FIRST AND EIGHTH CAUSES  
16 OF ACTION BECAUSE STATE LAW CREATES CAUSES OF ACTION FOR DECLARATORY RELIEF  
AND, RELATEDLY, INJUNCTIVE RELIEF**

17 The DOJ argues that the First and Eighth causes of action seeking declaratory and injunctive  
18 relief are barred as a matter of law. Although sensible on its face, the DOJ's argument that such claims  
19 fail because they are "remedies" and not genuine causes of action is unavailing. The First and Eighth  
20 claims are brought under Code of Civil Procedure section 1060 and the APA, respectively, and both  
21 statutes create private causes of action for declaratory and, relatedly, injunctive relief.

22 First, section 1060 plainly authorizes "an original action" "for a declaration of his or her rights  
23 and duties. . . ." and states that a party "may ask for a declaration of rights or duties, either alone or with  
24 other relief." And litigants routinely plead various causes of action arising out of the same factual  
25 allegations; that is as non-objectionable a proposition of legal practice as there is. To be certain, the "fact  
26 the same issue...is also raised in other causes of action does not in itself bar declaratory relief...of that  
27 cause of action." (*S. Cal. Edison Co. v. Super. Ct.* (1995) 37 Cal. App. 4th 839, 847.)

28 Similarly, there is simply too much published authority involving declaratory and injunctive relief

1 challenges in the APA context to countenance that such actions are defective as a matter of law and are  
2 improper ab initio. (See, e.g., *POET, LLC v. State Air Res. Bd.* (2013) 218 Cal.App.4th 681; *Slocum v.*  
3 *State Bd. of Equaliz.* (2005) 134 Cal.App.4th 969; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 497;  
4 *Faunce v. Denton* (1985) 167 Cal.App.3d 191, 193; *State of Cal. v. Super. Ct.* (1971) 16 Cal.App.3d 87.)

5 The DOJ’s reliance on *Coachella Valley Unified School District v. State of California* (2009) 176  
6 Cal.App.4th 93 is misplaced. There, the court did not dismiss the declaratory relief claim because it was  
7 void as a matter of law. It did so because it found that its resolution of the related writ against plaintiffs  
8 necessarily precluded the declaratory relief claim. (*Id.* at p. 126.) The court also noted that “on this issue,  
9 the complaint did not state separate causes of action; rather it asked for different forms of relief.” (*Id.* at  
10 p. 125.) But here, Petitioners have clearly stated separate causes of action. This authority is a non-  
11 sequitur that does not support the DOJ’s argument. The Court should overrule the DOJ’s demurrer.

12 **IV. THE COURT SHOULD OVERRULE THE DOJ’S DEMURRER TO THE EIGHTH CAUSE OF ACTION  
13 BECAUSE THE DOJ’S POLICY OF BLOCKING THE TRANSFER OF LEGAL FIREARMS IS AN  
14 UNDERGROUND REGULATION IN VIOLATION OF THE APA**

15 “An underground regulation is a regulation that a court may determine to be invalid because it  
16 was not adopted in substantial compliance with the procedures of the Administrative Procedure Act.”  
17 (*Modesto City Schools v. Educ. Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1381.) Under the  
18 APA, a regulation is “every rule, regulation, order, or standard of general application or the amendment,  
19 supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to  
20 implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”  
21 (Gov. Code, § 11342.600.) Petitioners allege that the DOJ maintains an internal rule or standard of  
22 general application prohibiting the sale of undefined firearm subtypes in California, as evidenced by its  
23 refusal to fix the known DES defect to allow for the sale of such firearms. (SAC ¶¶ 85, 186-188.) That  
24 the DOJ maintains the alleged policy is reaffirmed by the fact that the DOJ refused to fix the known  
25 defect, stalling until it successfully persuaded the legislature to ban centerfire Title 1 firearms. (SAC ¶  
26 97.) The DOJ’s conduct illegally blocked the transfer of around 35,000 Title 1 firearms (SAC ¶ 79),  
27 leaving no doubt that the DOJ’s action (or inaction) was part of a standard of general application.

28 Ultimately, the DOJ’s unilateral decision to block tens of thousands of legal firearm sales is  
exactly the type of action the APA protects against. “A major aim of the APA was to provide a procedure

1 whereby people to be affected may be heard on the merits of proposed rules.” (*Armistead v. State Pers. Bd.* (1978) 22 Cal.3d 198, 204.) The DOJ did not bother to give the thousands of people who wanted to purchase Title 1 firearms or other undefined firearms subtypes a chance to be heard. Instead, it refused (and *still* refuses) to fix the DES to facilitate transfer of these legal firearms and offers no alternative method to submit the statutorily required information as it is authorized to do.

6 In their second demurrer, the DOJ argues for the first time that the configuration of the DES  
7 cannot be a “regulation” because the DES is an electronic web-based system, not a rule, order, or  
8 standard. (Dem., p. 20.) That might have been a strong point if Petitioners alleged that the configuration  
9 of DES itself constituted an underground regulation, but they did not. Instead, the SAC challenges the  
10 validity of policies “that prohibit[s] the transfer of lawful firearms to lawful purchasers.” (SAC ¶ 85.)  
11 While this includes “designing, developing, implementing, or modifying” (SAC ¶ 85) the DES in a way  
12 that prevents transfers from proceeding, the SAC is clear that what is at issue is not the DES itself, but  
13 the DOJ’s underground regulation barring the sale of undefined firearm subtypes. (SAC ¶ 93 [“The  
14 challenged rules at issue, ***including but not limited to the prohibition of certain lawful firearms from  
being transferred*** because of DEFENDANTS’ technological barriers...”].) That internal rule, Petitioners  
15 believe, is why the DOJ refuses to correct the alleged DES defect.<sup>5</sup>  
16

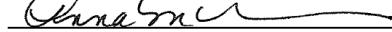
17 But even if Petitioners objected to the DES directly, this case squares with Government Code  
18 section 11340.9, which clarifies that while the APA does not apply to all forms used by an agency, when  
19 a form is necessary to implement the law under which the form is issued, as the DES is, it must be  
20 adopted under the requirements of the APA. (Gov. Code, § 11340.9, subd. (c).)

## 21 CONCLUSION

22 For these reasons, the DOJ’s demurrer should be overruled in its entirety. But if the Court sustains  
23 any part of it, Petitioners again request leave to amend.

24 Date: May 20, 2021

**MICHEL & ASSOCIATES, P.C.**

  
25 Anna M. Barvir

26 Attorneys for Petitioners-Plaintiffs

27 <sup>5</sup> The DOJ cannot hide behind the fact that Petitioners have not identified some kind of internal  
28 written rule as the basis of its claim. If such were required to state a claim under the APA’s ban on  
underground regulations, public agencies could simply evade liability by refusing to put its agency-wide  
customs and policies into writing. Such a loophole would make the APA all but obsolete.

# **EXHIBIT A**

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7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF LOS ANGELES**

10 FRANKLIN ARMORY, INC. and  
11 CALIFORNIA RIFLE & PISTOL  
ASSOCIATION, INCORPORATED

12 Petitioners-Plaintiffs,

13 v.

14 CALIFORNIA DEPARTMENT OF JUSTICE,  
15 XAVIER BECERRA, in his official capacity  
as Attorney General for the State of California,  
and DOES 1-10,

16 Respondents-Defendants.

17 Case No.: 20STCP01747

18 **PLAINTIFF FRANKLIN ARMORY,  
19 INC.'S RESPONSE TO DEFENDANT  
CALIFORNIA DEPARTMENT OF  
JUSTICE'S FORM  
INTERROGATORIES-GENERAL, SET  
ONE**

20 Action filed: May 27, 2020

21 PROPOUNDING PARTY: Defendant-Respondent California Department of Justice

22 RESPONDING PARTY: Plaintiff-Petitioner Franklin Armory, Inc.

23 SET NUMBER: One

24

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26

27

28

1 theories, analyses of written data, attorney notes and impressions, recorded statements taken by counsel,  
2 any work done by investigators or agents. The discovery in this lawsuit is still in the nascent stages and  
3 many “facts” that are believed to be true at this time might be revealed to be incorrect later. These  
4 “facts” are thus, at this point, largely assumptions and beliefs on the part of the attorney and, therefore,  
5 are part of the attorney work product. The attorney for Responding Party is not required to review their  
6 thinking processes for opposing counsel. And, to the extent that it seeks information about potential  
7 expert witnesses, Responding Party has not yet decided on which, if any, experts may be called at the  
8 time of trial. Any experts utilized by party to date are for purposes of consultation and case preparation  
9 only. (*Sheets v. Super. Ct.* (1967) 257 Cal.App.2d 1; *Sanders v. Super. Ct.* (1973) 34 Cal.App.3d 270.)

10                   **Subject to and without waiving the foregoing objections, Responding Party responds:**

11                   Respondents, as the state entity in charge of overseeing and enforcing California’s firearm laws,  
12 including registrations and inspections, are no doubt familiar with the following list of firearms that have  
13 been manufactured for well over 100 years. By way of example:

14                   Invented in 1861, the Gatling gun is a “firearm with an undefined subtype.”

15                   Buntline Revolvers with barrels of 16 inches or more in length, such as the Colt Buntline Special  
16 Single Action Army Revolver, would constitute “firearms with an undefined subtype” and have been  
17 manufactured since the mid-1800s as well. Uberti, USA offers the Buntline Target, a revolver with a 16”  
18 barrel that would constitute a “firearm with an undefined subtype” under California law.

19                   Certain configurations of mounted firearms have been manufactured for years and would  
20 constitute a “firearm with an undefined subtype. For example, the Browning 1919A4 firearms began  
21 production in approximately 1936 and would be deemed “firearms with an undefined firearm subtype.”  
22 And defendants are fully aware of such firearms. On March 28, 2000, the California Department of  
23 Justice issued a letter to Mr. Tim Bero, President of TNW, Inc., about a conversation that they had  
24 relating to the Browning .30 Cal. M-1919 A4 and A6, as well as the Browning .50 Cal. M2 semi-  
25 automatic rifles configured with a pistol grip or butterfly grip, and clarifying that said firearms would  
26 not constitute “assault weapons” under California law at that time. And, again on November 3, 2004, the  
27 Director of the Firearms Division of the California Department of Justice issued a letter stating that a  
28 U.S. Ordinance Semi-60 configured with a butterfly grip, which would constitute “firearm with an

1 undefined subtype," was not an "assault weapon" under California law at that time.

2 One of the most common types of firearms in the United States are barreled action firearms.  
3 Barreled action firearms are sold with and without stocks to allow the ultimate end user to purchase a  
4 stock that best suits their needs. Barreled action firearms sold or configured without their stock would be  
5 deemed "firearms with an undefined subtype." Such firearms are currently sold nationwide. A simple  
6 search of one online retailer, Brownells.com, for "barreled receivers" reveals the following list of  
7 barreled action firearms available for sale at the time of this response that would constitute "firearms  
8 with an undefined subtype" (and not bare receivers) that cannot lawfully be transferred under the DES as  
9 it is currently configured:

10       • *Remington:*

11           ■ REMINGTON 700 S/A MAGNUM ACTION  
12           ■ REMINGTON 700 SPS TACTICAL 20" HEAVY BARRELED ACTION .308 WIN

13       • *Howa:*

14           ■ 1500 6.5 CREEDMOOR 24" THREADED HEAVY BARRELED ACTION  
15           ■ 1500 6.5 GRENDEL 20" THREADED HEAVY BARRELED MINI ACTION  
16           ■ 1500 300BLK 16.25" HEAVY THREADED BARREL MINI ACTION  
17           ■ 1500 BARRELED ACTION STANDARD BARREL BLUE .30-06 #2  
18           ■ 1500 BARRELED ACTION LIGHTWEIGHT BLUE 6.5 CREEDMOOR #1  
19           ■ M1500 BARRELED ACTION 300 PRC THREADED  
20           ■ 24" 6mm CREEDMOOR BARRELED ACTION  
21           ■ 1500 BARRELED ACTION HEAVY 26" BRL BLUE .308 WIN #6 THREADED  
22           ■ 1500 308 WIN 20" THREADED HEAVY BARRELED ACTION  
23           ■ 1500 6.5 CREEDMOOR 22" SPORTER BARRELED ACTION  
24           ■ 1500 6.5 GRENDEL 22" SPORTER BARRELED MINI ACTION  
25           ■ 1500 BARRELED ACTION SEMI HEAVY BARREL .300 WIN MAG THREAD  
26           1/2-28  
27           ■ 1500 22" NON-THREADED BARRELED ACTION 6MM CREEDMOOR  
28           ■ 1500 BARRELED ACTION MINI ACTION STANDARD BLUE 22"

- 1       ■ 1500 BARRELED ACTION LW CERAKOTE GRAY .243 WIN #1
- 2       ■ 1500 308 WIN 24" THREADED HEAVY BARRELED ACTION
- 3       ■ 1500 30-06 22" SPORTER BARRELED ACTION CERAKOTE
- 4       ■ 1500 BARRELED ACTION STANDARD BARREL BLUE .270 WIN #2
- 5       ■ 1500 BARRELED ACTION STANDARD BARREL BLUE 22-250 REM #2
- 6       ■ 1500 308 WIN 22" SPORTER BARRELED ACTION
- 7       ■ 1500 22-250 THREADED HEAVY BARRELED ACTION
- 8       ■ 1500 7.62X39 20" THREADED HEAVY BARRELED MINI ACTION
- 9       ■ 1500 BARRELED ACTION MAG BLUE .300 WIN MAG #2
- 10       ■ 1500 BARRELED ACTION STD CERAKOTE GRAY .308 WIN #2
- 11       ■ 1500 BARRELED ACTION LW CERAKOTE GRAY .223 REM #1
- 12       ■ 1500 BARRELED ACTION STD CERAKOTE GRAY .243 WIN #2
- 13       ■ 1500 BARRELED ACTION LIGHTWEIGHT BLUE .308 WIN #1
- 14       ■ 1500 BARRELED ACTION STANDARD BARREL BLUE .243 WIN #2
- 15       • *Bergara:*
  - 16       ■ B14R 22LR BARRELED ACTION 18" STEEL THREADED
  - 17       ■ PREMIER SERIES 300 PRC BARRELED ACTIONS
  - 18       ■ PREMIER SERIES 6.5MM CREEDMOOR BARRELED ACTIONS
  - 19       ■ B14R 22LR BARRELED ACTION 18" CARBON FIBER THREADED
  - 20       ■ PREMIER SERIES BARRLED ACTIONS 7MM REM MAG THREADED
  - 21       ■ PREMIER SERIES BARRELED ACTIONS 6.5 PRC THREADED
  - 22       ■ PREMIER SERIES 308 WINCHESTER BARRELED ACTIONS
  - 23       ■ PREMIER SERIES BARRELED ACTION .270 NO TRIGGER THREADED
  - 24       ■ PREMIER SERIES 300 WINCHESTER MAGNUM BARRELED ACTIONS
  - 25       ■ PREMIER SERIES BARRELED ACTION 30-06 THREADED
  - 26       ■ PREMIER SERIES BARRELED ACTION .223 NO TRIGGER THREADED
  - 27       ■ PREMIER SERIES BARRELED ACTION .280 ACKLEY IMP THREADED
  - 28       ■ PREMIER SERIERS BARRELED ACTION 22-250 THREADED

1           ■ PREMIER SERIES 6MM CREEDMOOR BARRELED ACTIONS  
2        • *Area 419*:  
3           ■ DEFIANCE TENACITY BARRELED ACTIONS  
4        • *Blackheart*:  
5           ■ AK-47 BARRELED RECEIVER 7.62X39 FIXED STOCK  
6           ■ AK-47 BARRELED RECEIVER 7.62X39 UNDERFOLDER  
7        • *Brownells*:  
8           ■ BRN-22 BARRELED RECEIVER FOR RUGER™ 10/22™

9           Other examples include firearms that are chambered for shot shells, including but not limited to  
10          the O.F. Mossberg & Sons, Inc. model Cruiser chambered in 12 gauge with an 18" barrel, which does  
11          not satisfy the definition handgun, rifle, nor shotgun under California law.

12          These are merely examples of what are likely thousands of variants of "firearms with an  
13          undefined subtype" that that are currently on the market today and cannot be lawfully transferred  
14          through the DES as it currently exists.

15          (c)     In addition to Propounding Party, the following are persons known to have knowledge of  
16          these facts:

17           Franklin Armory, Inc.,  
18           c/o Jay Jacobson  
19           2246 Park Place Suite B  
20           Minden, NV 89423  
21           Phone: 775-783-4313

22           Jason A. Davis  
23           Michel & Associates, P.C.  
24           180 E. Ocean Blvd, Suite 200  
25           Long Beach, CA 90802  
26           Phone: 562-216-4444.

27           C.D. Michel  
28           Michel & Associates, P.C.  
29           180 E. Ocean Blvd, Suite 200  
30           Long Beach, CA 90802  
31           Phone: 562-216-4444

32           Tim Bero  
33           President of TNW, Inc.  
34           Address and telephone number unknown

35           Randy Rossi

1                   Former Director of Firearms Division  
2                   California Department of Justice  
3                   Address and telephone number unknown

4                   Tim Rieger  
5                   Former Counsel of Firearms Division  
6                   California Department of Justice  
7                   Address and telephone number unknown

8                   (d)    On March 28, 2000, the California Department of Justice issued a letter to Mr. Tim Bero,  
9                   President of TNW, Inc., about a conversation that they had relating to the Browning .30 Cal. M-1919 A4  
10                  and A6, as well as the Browning .50 Cal. M2 semi-automatic rifles configured with a pistol grip or  
11                  butterfly grip, and clarifying that said firearms would not constitute “assault weapons” under California  
12                  law at that time. And, again on November 3, 2004, the Director of the Firearms Division of the  
13                  California Department of Justice issued a letter stating that a U.S. Ordinance Semi-60 configured with a  
14                  butterfly grip, which would constitute “firearm with an undefined subtype,” was not an “assault  
15                  weapon” under California law at that time. (Counsel for Responding Party, Michel & Associates, 180 E.  
16                  Ocean Blvd., Suite 200, Long Beach, CA 90802, Phone: 562-216-4444).

17                  Hog, The Illustrated Encyclopedia of Firearms (1978)

18                  Smith, Small Arms of the World (1973)

19                  [https://en.wikipedia.org/wiki/Colt\\_Buntline](https://en.wikipedia.org/wiki/Colt_Buntline)

20                  <https://www.foxbusiness.com/features/rare-colт-buntline-a-special-inheritance>

21                  <https://www.guns.com/news/2013/02/27/the-buntline-special-the-colт-shooters-holy-or-false-grail>

22                  [https://military.wikia.org/wiki/Colt\\_Buntline](https://military.wikia.org/wiki/Colt_Buntline)

23                  <https://www.brownells.com/search/index.htm?k=barreled+receivers&ksubmit=y>

24                  <https://www.uberti-usa.com/1873-revolver-carbine-and-buntline>

25                  (a)    **Request for Admission No. 4**

26                  (b)    Objection.

27                  1.    Responding Party has not yet completed the investigation of the facts and discovery  
28                  relating to this case. It is anticipated that further factual investigation, legal research, factual and legal

## VERIFICATION

I, Jay Jacobson, declare as follows:

I am the President of Franklin Armory, Inc., and I am authorized to make this verification for and on its behalf.

5 I declare that I have read the foregoing PLAINTIFF FRANKLIN ARMORY, INC.'S  
6 RESPONSE TO DEFENDANT CALIFORNIA DEPARTMENT OF JUSTICE'S FORM  
7 INTERROGATORIES-GENERAL, SET ONE, in the matter of *Franklin Armory, Inc., et al. v.*  
8 *California Department of Justice, et al.*, and I know its contents. I declare that the information stated  
9 therein is either true of my own knowledge or is based on information and belief, and as to those  
10 matters, I believe them to be true.

11 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
12 true and correct.

13 Executed on January 20, 2021, at Douglas County, Nevada.

  
Jay Jacobson

## 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 May 20, 2021, I served the foregoing document(s) described as

**PLAINTIFFS AND PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN  
OPPOSITION TO RESPONDENTS' DEMURRER**

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

## Benjamin Barnouw

Supervising Deputy Attorney General

Email: [ben.barnouw@doj.ca.gov](mailto:ben.barnouw@doj.ca.gov)

California Department of Justice

300 South Spring Street, Suite 1702

1000 Main Street, Suite 1000  
Los Angeles, CA 90013

Attorney for Respondents-Defendants

(BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. 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 May 20, 2021, at Long Beach, California.

Laura Palmerin

1 ROB BONTA  
2 Attorney General of California  
3 BENJAMIN BARNOUW  
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8 *Attorneys for Defendants and Respondents*  
9 *California Department of Justice and Former*  
*Attorney General Xavier Becerra*

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

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

Case No. 20STCP01747

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

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

Honorable James C. Chalfant

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

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

2 Petitioners also incorrectly assert that the standing requirement under California law is "less  
3 rigid" than under Federal law, citing *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241.  
4 The *Weatherford* court only noted that the standing analysis under California law "differs  
5 somewhat" from a standing analysis in federal courts because the federal Constitution contains an  
6 independent jurisdictional limitation not contained in the California Constitution. (*Id.* at pp.  
7 1247-1248.) However, the *Weatherford* court made clear that, under California law, in order to  
8 establish standing, a party is required to show that he or she is sufficiently interested as a  
9 threshold prerequisite to deciding a claim on the merits. (*Id.* at p. 1247.)

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

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

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

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

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

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

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

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

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

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

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

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

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

27 

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Dated: May 26, 2021

Respectfully Submitted,

10 ROB BONTA  
11 Attorney General of California  
12 BENJAMIN BARNOUW  
13 Supervising Deputy Attorney General



14 KENNETH G. LAKE  
15 Deputy Attorney General  
16 *Attorneys for Defendants and Respondents*  
17 *California Department of Justice and*  
18 *Former Attorney General Xavier Becerra*

28

## **DECLARATION OF SERVICE BY ELECTRONICA MAIL**

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

I declare: I am employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 300 South Spring Street, Room 1700, Los Angeles, California 90013. On May 26, 2021, I served the documents named below on the parties in this action as follows:

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

Anna M. Barvir  
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*Attorneys for Plaintiffs-Petitioners*

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

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

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

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

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

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

Executed on May 26, 2021, at Los Angeles, California.

Sandra Dominguez

**Declarant**

/s/ Sandra Dominguez

### Signature

Respondents California Department of Justice ("DOJ") and Xavier Becerra, in his capacity as Attorney General, demur to portions of the Second Amended Complaint ("SAC") filed by Petitioners Franklin Armory, Inc., ("FAI") and the California Rifle & Pistol Association, Inc. ("Association").

The court has read and considered the moving papers, opposition,<sup>1</sup> and reply, and renders the following tentative decision.

#### **A. Statement of the Case**

##### **1. Petition**

Petitioners commenced this action on May 27, 2020. The operative pleading is the SAC filed on February 17, 2021, alleging causes of action for: (1) declaratory relief; (2) traditional mandamus; (3) tortious interference with contractual relations; (4) tortious interference with prospective economic advantage; (5) negligent interference with a prospective economic advantage; (6) deprivation of liberty without procedural due process of law; (7) deprivation of substantive due process of law; and (8) violation of public policy. The verified SAC alleges in pertinent part as follows.

As of January 1, 2003, licensed firearm dealers in California are required to submit all background checks to DOJ electronically via the Dealer Record of Sale Entry System ("DES"). The DES is a web-based application designed, developed, and maintained by DOJ and used by firearm dealers to report the required information.

The DES can facilitate the transfer of certain types of firearms: "handguns" ("pistols" or "revolvers"), "rifles," and "shotguns." This information is entered into the DES during the application process by the user selecting the appropriate type/subtype of firearm within a predetermined drop-down list. Many firearms do not qualify as handguns, pistols, revolvers, rifles, or shotguns, or even "frames" or "receivers" for said firearms. The DES drop-down list for firearm type/subtype has no provision for "other" firearms such as "undefined firearm subtypes."

Because dealers cannot accurately submit the required information through the DES for "long guns" that are undefined firearm subtypes, they are prohibited from processing and accepting applications from purchasers of said firearms. Respondents have designed the DES with this technological barrier that functions to prohibit the transfer through a licensed firearms dealer of all firearms that are long guns but not rifles, shotguns, or rifle/shotgun combinations.

Respondents have long known about the DES' deficiencies and have refused requests to correct it. Since 2012, FAI has communicated with Respondents about the design and features of its Title 1 firearms that do not fall under the existing DES categories and informed Respondent

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<sup>1</sup> The parties failed to lodge courtesy copies of their demurrer and opposition brief in violation of the Presiding Judge's General Order Re: Mandatory Electronic Filing. Their counsel is admonished to provide courtesy copies in all future filings.

DOJ of the DES's defects as early as October 24, 2019.

Despite the fact that it has proven it can quickly make the requested change, DOJ has refused to modify the DES. It previously addressed a similar deficiency regarding the drop-down list for transferee's nation of origin—a deficiency FAI reported at the same time it raised the issue of undefined firearm subtypes—within weeks. Respondents have neither corrected the DES, nor has it implemented alternative procedures to facilitate the lawful transfer of “firearms with an undefined subtype,” including but not limited to the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms.

Respondents' motivation in delaying was to buy time to work with the Legislature to develop legislation designating FAI Title 1 style firearms as “assault weapons” and restricting their sale. The scheme proved successful because on August 6, 2020 the Legislature passed Senate Bill 118 (“SB 118”), which 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 of a list of enumerated characteristics, like a forward pistol grip or thumbhole stock. The effect of SB 118 was to restrict FAI's transfer of centerfire versions of FAI Title 1 firearms to customers despite existing orders that long predated SB 118. Even after the adoption of SB 118, not all FAI's Title 1 firearms have been reclassified as assault weapons.

The first cause of action seeks a judicial declaration about the legality of Respondents' conduct regarding the DES and undefined firearm subtypes and an injunction to prevent Respondents from enforcing administrative and/or technological barriers that prevent the sale of lawful “firearms with an undefined subtype,” 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 from enforcing the Roberti-Roos Assault Weapons Act in a manner that prohibits those who could have lawfully acquired and registered their FAI Title 1 style firearm but for Respondents' technological barriers.

The second cause of action is for a writ of mandate directing Respondents to design, maintain, and enforce updates to the DES such that it does not proscribe the lawful sale, transfer, and loan of a class of lawful firearms, including FAI's Title 1 firearms. It also asks the court to direct Respondents to design, implement, maintain, and enforce updates to their assault weapons registration process to permit the registration of variants of the FAI Title 1 style firearms by those whose orders were placed on or before August 6, 2020, or such time as deemed appropriate by the court.

The eighth cause of action is for declaratory and injunctive relief for Respondents' violation of the Administrative Procedure Act (“APA”). Petitioners seek a declaration that Respondents' de facto ban on the transfer of undefined firearm subtypes, including but not limited to the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms and barreled action firearms, constitutes an underground regulation in violation of the APA and an injunction preventing enforcement of the underground regulation.<sup>2</sup>

## **2. Course of Proceedings**

On February 25, 2021, the court sustained with leave to amend Respondents' demurrer to the First Amended Complaint (“FAC”).

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<sup>2</sup> The third through seventh causes of action seek damages and have been stayed.

## **B. Applicable Law**

Demurrsers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); *Coyne v. Krempels*, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; *Skrbina v. Fleming Companies*, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain (“uncertain” includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); *Blank v. Kirwan*, (1985) 39 Cal.3d 311, 318. The face of the pleading includes attachments and incorporations by reference (*Frantz v. Blackwell*, (1987) 189 Cal.App.3d 91, 94); it does not include inadmissible hearsay. *Day v. Sharp*, (1975) 50 Cal.App.3d 904, 914.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. *Garcetti v. Superior Court*, (1996) 49 Cal.App.4th 1533, 1547; *Limandri v. Judkins*, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff's ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. *Quelimane Co. v. Stewart Title Guaranty Co.*, (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. *Marshall v. Gibson, Dunn & Crutcher*, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. *Vance v. Villa Park Mobilehome Estates*, (1995) 36 Cal.App.4th 698, 709.

For all demurrsers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.31(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.31(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. *Id.* The demurring party is responsible for filing and serving a declaration that the

meet and confer requirement has been met. CCP §430.31(a)(3).

### **C. Governing Law**

Under the Penal Code, there are three basic types of firearms: (1) handguns, also referred to as pistols and revolvers; (b) rifles; and (c) shotguns.

A handgun generally has a barrel length less than 16 inches and can be concealed on a person, and is synonymous with the terms pistol, revolver, and firearm capable of being concealed upon the person. Penal Code §§ 16530(a), 16640(a).

A rifle is a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger. Penal Code §17090.

A shotgun is a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger. Penal Code §17190. The term "long gun" generally refers to rifles and shotguns. *See, e.g.*, Penal Code, §16865.

In California, individuals generally must purchase firearms through a licensed dealer. Penal Code §26500(a). Individuals must also have a licensed dealer process transfers of firearms, including private sales, gifts, and loans. Penal Code §§ 27545, 28050.

When an individual goes to a gun dealer to initiate a purchase or other transaction involving a firearm, the dealer is required to obtain information and create a record of the transaction. Penal Code §28100(a). This record is referred to as a Dealer Record of Sale ("DROS"). Various information about the firearm must be included on the DROS, including the make of firearm, manufacturer's name if stamped on the firearm, model name or number if stamped on the firearm, caliber, and type of firearm. Penal Code §28160(a). The DROS must also include information regarding the purchaser, including their name, date of birth, local and permanent addresses, place of birth, occupation, gender, physical description, all legal names and aliases ever used, and a "yes or no" answer whether they are in any of the categories of persons prohibited from purchasing a firearm. *Ibid.*

The dealer must transmit the DROS to DOJ and is required to wait at least ten days before completing the purchase and delivering the firearm to the purchaser, assuming the result of a background check has been received by then. Penal Code §§ 26815(a), (b), 27540(a).

The DROS must be submitted to DOJ electronically, except as DOJ otherwise permits. Penal Code §28205(c). DOJ shall prescribe the form of the register and the record of electronic transfer pursuant to Penal Code section 28105. Penal Code §28155. The DES is the method established by DOJ for the submission of purchaser information required by Penal Code section 28160(a). The DES is a web-based application designed, developed, and maintained by DOJ and used by firearm dealers to report the required information.

Any semi-automatic centerfire firearm that is not a rifle, pistol, or shotgun that has one or more specified characteristics is classified as an assault weapon. Penal Code §30515(a)(9)-(11). Individuals are restricted from possessing any firearm classified as an assault weapon unless they possessed the firearm prior to its classification as an assault weapon or are exempt as a member of law enforcement, military forces, or other specified entities. Penal Code §§ 30605, 30620, 30625,

30645.

#### **D. Analysis**

Respondents demur to the SAC's first, second, and eighth causes of action on the grounds that (1) Petitioners lack standing, (2) these claims fail to allege sufficient facts to support a cause of action and (3) these claims fail to establish a mandatory, ministerial duty.

Respondents have complied with the meet and confer requirements of CCP section 430.31(a). Lake Decl., ¶2.

#### **1. Standing**

Respondents argue that Petitioners do not have standing to pursue mandamus because they fail to allege specific facts as to a particular mode of a firearm that they are unable to process through DES. Dem. at 12.

Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff. Mendoza v. JPMorgan Chase Bank, N.A., ("Mendoza") (2016) 6 Cal.App.5th 802, 810. As a general rule, a party must be "beneficially interested" to seek a writ of mandate. Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist., (2015) 235 Cal.App.4th 957, 962 (citing CCP §1086). Likewise, to seek declaratory relief, a party must be an "interested person." CCP §1060. An "interested person" means the same thing as a "beneficially interested" person in mandamus cases. Asimow, et al., Administrative Law (2018), Ch. 14, §14:6. "Beneficially interested" has been generally interpreted to mean that one may obtain the writ only if the person has 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. SJJC Aviation Services, LLC v. City of San Jose, ("SJJC") (2017) 12 Cal.App.5th 1043, 1053. The beneficial interest must be direct and substantial. Ibid. A petition has no beneficial interest if she will gain no direct benefit from the writ's issuance and suffer no direct detriment if it is denied. Ibid.

Respondents admit that the SEC refers to a specific model of Title 1 rimfire that is a .17 WSM rimfire caliber. However, Respondents note that the court sustained the demurrer to the FAC partially because Petitioners failed to allege specific models of firearms and the SAC only alleges three general categories of firearms (buntline revolvers, butterfly grip firearms and barreled action firearms) rather than any specific model. Dem. at 12. Respondents argue that the allegation concerning the Title 1 rimfire model, but they fail to allege any specific component of the Title 1 rimfire model that establishes why it is not a handgun, rifle or shotgun. Dem. at 12; Reply at 3-4. There are no allegations establishing that this model cannot be processed through the DES, making Petitioners' claim conjectural. Dem. at 12; Reply at 3-4.

It is true that the court directed Petitioners to allege specific models. Petitioners argue that the SAC does so by referring to Browning 1919 A4 firearms, including the Browning .30 Cal.M-1919 A4, Browning .50 Cal. M2 semiautomatic rifles configured with a pistol or butterfly grip, and U.S. Ordinance Semi-60 configured with a butterfly grip. SAC ¶¶ 30-31. Respondents do not reply to this argument and the court is not qualified to ascertain whether these are models or types.

In any event, Respondents' admission that the SEC refers to a specific model of Title 1 rimfire that is a .17 WSM rimfire caliber is sufficient. Petitioners are correct that there is a minimal

pleading requirement and, if the pleadings contain sufficient particularity and precision to acquaint the defendants with the nature, source, and extent of the cause of action, a demurrer should be overruled. County of Santa Clara v. Superior Court, (2009) 171 Cal.App.4th 119, 126. A complaint need only provide fair notice of the pleaded claim (Lee v. Hanley, (2015) 61 Cal.4<sup>th</sup> 1225, 1238-39) and Petitioners have done so for the Title 1 rimfire.<sup>3</sup>

Respondents also argue that Petitioners do not have standing because the SAC does not allege that anyone actually attempted to purchase, sell or transfer a Title 1 rimfire model or any firearm in the Buntline revolver, butterfly grip or barreled action categories. Dem. at 13. The SAC identifies Ryan Fellows and Beverly Espendido as seeking to acquire a Title 1 rimfire and buntline revolver, respectively, and Coyote Point Armory, a licensed dealer, as seeking to sell and buntline revolver and other lawful firearms, including a Title 1 rimfire, and that all three have been prevented from doing so by Respondents' actions. SAC ¶¶ 99-101. But the SAC fails to allege that the dealer took any concrete action toward actually selling a firearm or having a purchaser come to its store to initiate processing of a transfer in the DES and there is no allegation that any dealer attempted to process any of these firearms in the DES. Dem. at 13; Reply at 3-4.

The short answer is that Petitioners are not required to allege evidentiary details to achieve standing.<sup>4</sup>

Additionally, Petitioners correctly respond that they and CRPA members and dealers need not perform useless acts as a prerequisite for seeking judicial relief. Van Gammeren v. City of Fresno, (1942) 51 Cal.App.2d 235, 240. The SAC alleges that, because dealers cannot accurately submit the required information through DES for long guns that are undefined firearm subtypes, they cannot process and accept applications for such firearms. SAC ¶59. Petitioners assert that they are not required to allege such specific instances because doing so would be futile due to the nature of the DES and the requirement of 11 CCR section 4210(b)(2)(6), which prohibits the input of inaccurate information into the DES. Opp. at 13. Respondents only weakly respond that there is no futility exception to the requirement of standing. Reply at 4.

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.<sup>5</sup>

## **2. Mandatory Ministerial Duty**

Respondents contend that the SAC fails to allege sufficient facts establishing a mandatory, ministerial duty to modify the DES. Dem. at 15; Reply at 5.

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<sup>3</sup> Petitioners also purport to rely on their discovery responses which identify by make and model dozens of examples of buntlines, butterfly grip firearms and barreled action firearms without stocks that are undefined firearm subtypes that cannot be transferred through DES. Ex. A. Opp. at 12. The discovery responses cannot be considered on demurrer; they only are useful to show that the notice required for pleading can be fleshed out in discovery.

<sup>4</sup> Respondents note that, according to Petitioners' admission (SAC ¶29) the firearm models in question have been manufactured for decades and are known to Respondents, yet the SAC still fails to allege any specific instance where one could not be transferred through the DES. Reply at 2. This is an evidentiary matter for trial.

<sup>5</sup> Because Petitioners have beneficial interest standing, the court need not address public interest standing. The controversy also is ripe.

Generally, mandamus may only be employed to compel the performance of a duty that is purely ministerial in character. Mandate will not issue if the duty is not plain or is mixed with discretionary power or the exercise of judgment. Mooney v. Garcia, (2012) 207 Cal.App.4th 229, 232-33.

Respondents assert that none of the statutes on which Petitioners rely -- Penal Code sections 28155, 28205, 28215 and 28220 -- establish a mandatory, ministerial duty to modify the DES. Dem. at 15; Reply at 5.

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

Petitioners rely on the statutory scheme for firearm transfer. The DOJ shall prescribe the form of the register and the record of electronic transfer pursuant to Penal Code section 28105. Pen. Code §28155. Penal Code section 28205 requires the DOJ to determine the method by which a dealer shall submit firearm purchaser information. On or after January 1, 2003 electronic transfer shall be the exclusive means by which information is transmitted to the department, except as permitted by the DOJ. Penal Code section 28215 describes the process through which dealer and applicant submit an application for approval of a firearm transaction. Penal Code section 28220 sets out procedures to follow upon submission of firearm purchaser information to the DOJ, including examination of records pertaining to a purchaser and submission of information to a dealer relating to whether the purchaser is prohibited from receiving a firearm.

Petitioners argue that these statutes create a clear ministerial duty for Respondents to maintain the DES in a manner that does not block the transfer of legal firearms. Petitioners rely on Penal Code Section 28160, which requires that "for all firearms, the register or record of electronic transfer shall include all of the following information..." Opp. at 15. The Penal Code then lists several items that the record of electronic transfer "shall" include, including the "[t]ype of firearm." Pen. Code, §28160(a)(14). By refusing to correct the DES to facilitate the transfer of undefined firearm subtypes (Title 1 firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms without stocks), the DOJ violates its duty to create a system that allows firearm retailers to include the statutorily required information for all firearms. Opp. at 15.

Respondents argue that these statutes do not include any mandatory requirement that the DOJ operate the DES in any particular manner. Dem. at 16-17; Reply at 5-6. They instead provide the DOJ with discretion to utilize the DES or another method. Id.

This is true, but Respondents misread Petitioners' point. Petitioners acknowledge that the DOJ has discretion in the manner in which it implements the electronic transfer system for firearm transfer, and argue that this discretion does not affect the substance of its duty. Opp. at 17. Surely, even the DOJ would admit that it does not have discretion to refuse to implement an electronic transfer system entirely. Penal Code section 28160 requires as much. If the DOJ has a ministerial duty to implement some electronic transfer system, then it is no large jump to conclude that it cannot arbitrarily discriminate in the system it must implement. That is all Petitioners are saying and Penal Code section 28160's reference to an electronic transfer system for all firearms supports

this ministerial duty. In other words, the DOJ has discretion in how it implements the electronic transfer system, but the discretion has limits.

In reply, Respondents argue that the reference to “all firearms” in section 28160 does not imply that there must be DROS information for every firearm. The phrase “all firearms” conveys that the same DROS information is required for both “handguns” and “firearms other than handguns,” which had not been the case prior to January 1, 2014 under Penal Code section 12077, which was repealed as of January 1, 2012. Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner or based on a respondent's belief that the respondent should act in a different manner. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693. Reply at 6-7.

To some extent, these statutory interpretation arguments are best left for trial, particularly since Petitioners are correct that Respondents could have made these arguments about the DOJ's discretion in their first demurrer. Opp. at 16. In any event, the language of AIDS Healthcare fully supports Petitioners in that the SAC pleads that the DOJ has failed to act by including the omitted firearms in DES and this failure to act was arbitrary and in derogation of the applicable legal standards. 197 Cal.App.4<sup>th</sup> at 704. The SAC sufficiently pleads that the DOJ has excluded certain firearms from DES for arbitrary reasons.

### **3. Declaratory and Injunctive Relief**

Respondents contend that the demurrer should be sustained as to the SAC's first and eighth causes of action for declaratory and injunctive relief because they are remedies, not independent causes of action. Dem. at 18-19; Reply at 8-9.

Respondents argue that requests for declaratory and injunctive relief are not independent causes of action but merely types of remedies. Batt v. City and County of San Francisco, (2007) 155 Cal.App.4th 65, 82. Nor is declaratory relief proper where it is duplicative of the primary claim. California Ins. Guarantee Assn. v. Superior Court, (1991) 231 Cal.App.3d 1617, 1623-24 (The object of the declaratory relief statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues). A demurrer is properly sustained as to a claim for declaratory relief which is wholly derivative of the statutory claim. Ball v. FleetBoston Fin. Corp. (2008) 164 Cal.App.4th 794, 800.

Respondents are correct about injunctive relief and that a declaratory relief claim may be subsumed in mandamus, but Petitioners are correct that declaratory relief is a cause of action under CCP section 1060. Opp. at 18. Respondents cite to Batt, which lists certain remedies that are not causes of action, including declaratory relief. 155 Cal.App.4<sup>th</sup> at 82 (citing Witkin). Witkin explains that declaratory relief is an equitable action that results in an equitable remedy. 5 California Procedure (Pleading), (5<sup>th</sup> ed. 2008) §850, pp. 265-66. Thus, declaratory relief is a remedy, but a CCP section 1060 claim is a cause of action that results in that remedy.

The first cause of action is for declaratory relief seeks to compel the DOJ to correct the DES. The second cause of action for mandamus also seeks to direct Respondents to design, maintain, and enforce updates to the DES such that it does not proscribe the lawful sale, transfer, and loan of a class of lawful firearms. Arguably, the proper action between these two is declaratory relief, not mandamus and the court will not sustain the demurrer to the declaratory relief claim as subsumed within mandamus. The eighth cause of action is for declaratory and injunctive relief. While injunctive relief is a remedy, declaratory relief is not, and the demurrer is overruled on that

ground.

#### **4. Administrative Procedure Act**

Respondents also demur to the eighth cause of action on the ground that the configuration of the DES is not a regulation governed by the APA. Dem. at 19. The SAC contends that the Respondents' conduct of operating the DES in a way that prevents the transfers of certain firearms constitutes an unlawful underground regulation in violation of the APA.

The APA establishes the procedures by which state agencies may adopt regulations. Tidewater Marine Western, Inc. v. Bradshaw, (1996) 14 Cal.4th 557, 568. No state agency shall issue, utilize, enforce, or attempt to enforce a regulation without complying with the APA's notice and comment provisions (Govt. Code, §11340.5(a)). Id. at 570. The APA defines "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure." Govt. Code, §11342.600.

Respondents argue that the configuration of the DES is not a regulation under the APA. It is an electronic web-based system that the DOJ uses to receive and process information submitted regarding firearm transfers. SAC ¶¶ 53-54. The configuration of the DES is not a "rule," "regulation," "order" or "standard," as those terms are used in Government Code section 11342.600. No court has determined that any similar web-based system or program constitutes a regulation subject to the APA. Moreover, the configuration of the DES does not result in any specific interpretation of law or legal determination being imposed with respect to a purchaser or other applicant or to a firearm. Govt. Code section 11340.9(c) specifically excludes forms prescribed by a state agency or any instructions relating to the use of the forms from consideration as regulations. Dem. at 20; Reply at 9-10.

Petitioners do not dispute that the DES configuration itself does not constitute a regulation under the APA. Opp. at 20. Instead, Petitioners argue that the SAC does not allege that the DES configuration itself is the underground regulation, but rather Respondents' policy in blocking the transfer of legal firearms is an internal rule or standard of general application that is an underground regulation. Opp. at 19.

Petitioners are correct. Respondents note (Reply at 9) that the SAC specifically describes the alleged underground regulation as "technological and administrative barriers" to the transfer of "undefined subtype" firearms. SAC ¶186. The only alleged "technological" or "administrative" barriers is the configuration of the DES. The only alleged manifestation or expression of the purported "internal" rule is the configuration of the DES. Reply at 9. True, but the SAC also alleges that it is challenging enforcement of policies and procedures that prohibit the transfer of firearms to lawful purchasers. SAC ¶85. These policies are implemented through the barriers created in the configuration of DES. SAC ¶93.

The demurrer to the eighth cause of action is overruled.

#### **E. Conclusion**

Respondents' demurrer to the SAC is overruled. Respondents have 20 days to answer only.

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Case No. 20STCP01747

**ANSWER TO THE FIRST, SECOND  
AND EIGHTH CAUSES OF ACTION TO  
THE SECOND AMENDED COMPLAINT  
AND PETITION**

## Respondents-Defendants.

25 Defendants and Respondents State of California, acting by and through the California  
26 Department of Justice and Former Attorney General Xavier Becerra in response to the first,

1 second and eighth causes of action to the second amended complaint and petition on file herein  
2 admit, deny, and allege as follows<sup>1</sup>:

3       1. Defendants are without sufficient knowledge or information to form a belief as to the  
4 allegations of paragraphs 1-6 and therefore deny them.

5       2. Paragraphs 7-8 appear to contain legal statements and argument only. To the extent  
6 paragraphs 7-8 can be construed as containing factual allegations requiring a response,  
7 Defendants deny them.

8       3. Defendants are without sufficient knowledge or information to form a belief as to the  
9 allegations of paragraphs 9-12 and therefore deny them.

10       4. Paragraphs 13-26 appear to contain legal statements and argument only. To the extent  
11 paragraphs 13-26 can be construed as containing factual allegations requiring a response,  
12 Defendants deny them.

13       5. Defendants are without sufficient knowledge or information to form a belief as to the  
14 allegations of paragraphs 27-33 and therefore deny them.

15       6. Paragraphs 34-45 appear to contain legal statements and argument only. To the extent  
16 paragraphs 34-45 can be construed as containing factual allegations requiring a response,  
17 Defendants deny them.

18       7. Defendants deny the allegations of paragraph 46.

19       8. Paragraphs 47-49 appear to contain legal statements and argument only. To the extent  
20 paragraphs 47-49 can be construed as containing factual allegations requiring a response,  
21 Defendants deny them.

22       9. Paragraphs 50-57 appear to contain legal statements, conclusions and argument. To the  
23 extent the legal statements, conclusions and argument in paragraphs 50-57 can be construed as  
24 containing factual allegations requiring a response, Defendants deny them. As to factual  
25 allegations contained in paragraphs 50-57, Defendants deny them.

26  
27       

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28       <sup>1</sup> The court has stayed all causes of action except the first, second and eighth causes.  
Therefore, no response to the other causes of action is required at this juncture.

1       10. Paragraph 58 appear to contain legal statements, conclusions and argument. To the  
2 extent the legal statements, conclusions and argument in paragraphs 58 can be construed as  
3 containing factual allegations requiring a response, Defendants deny them. As to factual  
4 allegations contained in paragraph 58, Defendants admit that when a DES user selects “Long Gun  
5 Transactions” and selects “No” for “Receiver Only,” then the user must select one of three  
6 options available in the “gun type” field, and that those three options are “RIFLE,” “SHOTGUN”  
7 and “RIFLE/SHOTGUN COMBINATION.” Defendants deny any and all other allegations in  
8 paragraph 58.

9       11. Paragraphs 59-78 appear to contain legal statements, conclusions and argument. To the  
10 extent the legal statements, conclusions and argument in paragraphs 50-78 can be construed as  
11 containing factual allegations requiring a response, Defendants deny them. As to factual  
12 allegations contained in paragraphs 59-78, Defendants deny them.

13       12. Defendants are without sufficient knowledge or information to form a belief as to the  
14 allegations of paragraphs 79 and therefore deny them.

15       13. Defendants deny the allegations of paragraph 80-84.

16       14. Paragraphs 85-92 appear to contain legal statements and argument only. To the extent  
17 paragraphs 85-92 can be construed as containing factual allegations requiring a response,  
18 Defendants deny them.

19       15. Defendants deny the allegations of paragraph 93-98.

20       16. Defendants are without sufficient knowledge or information to form a belief as to the  
21 allegations of paragraphs 99-102 and therefore deny them.

22       17. Paragraphs 103-106 appear to contain legal statements and argument only. To the  
23 extent paragraphs 103-106 can be construed as containing factual allegations requiring a  
24 response, Defendants deny them.

25       18. Defendants deny the allegations of paragraph 107-114.

26       19. Paragraph 115 contains a legal statement incorporating by reference all previous  
27 allegations. To the extent paragraphs 115 can be construed as containing factual allegations

1 requiring a response, Defendants deny them and incorporate by reference all previous responses  
2 to the allegations in the second amended complaint.

3 20. Defendants deny the allegations of paragraph 116-120.

4 21. Paragraph 121 contains a legal statement incorporating by reference all previous  
5 allegations. To the extent paragraphs 121 can be construed as containing factual allegations  
6 requiring a response, Defendants deny them and incorporate by reference all previous responses  
7 to the allegations in the second amended complaint.

8 22. Defendants deny the allegations of paragraph 122-128.

9 23. Paragraph 185 contains a legal statement incorporating by reference all previous  
10 allegations. To the extent paragraphs 185 can be construed as containing factual allegations  
11 requiring a response, Defendants deny them and incorporate by reference all previous responses  
12 to the allegations in the second amended complaint.

13 24. Defendants deny the allegations of paragraph 186-197.

14 **AS SEPARATE AND AFFIRMATIVE DEFENSES**, defendants allege as follows:

15 **AFFIRMATIVE DEFENSE NO. 1**

16 The second amended complaint, and each and every cause of action contained therein, fail  
17 to allege facts sufficient to constitute a cause of action against Defendants.

18 **AFFIRMATIVE DEFENSE NO. 2**

19 The second amended complaint, and each and every cause of action stated therein, fail to  
20 allege facts sufficient to entitle Plaintiffs to the relief requested therein.

21 **AFFIRMATIVE DEFENSE NO. 3**

22 The second amended complaint and each and every cause of action stated therein are barred  
23 by the applicable statute of limitations.

24 **AFFIRMATIVE DEFENSE NO. 4**

25 The second amended complaint, and each and every cause of action contained therein, is  
26 barred, in whole or in part, because Plaintiffs lack standing.

1       **AFFIRMATIVE DEFENSE NO. 5**

2           The second amended complaint and each cause of action alleged therein are barred by  
3 Plaintiffs' failure to join a necessary or indispensable party or parties.

4       **AFFIRMATIVE DEFENSE NO. 6**

5           To the extent applicable, the second amended complaint, and each cause of action therein,  
6 are barred by the doctrine of res judicata.

7       **AFFIRMATIVE DEFENSE NO. 7**

8           To the extent applicable, the second amended complaint, and each cause of action therein,  
9 are barred by the doctrine of collateral estoppel.

10       **AFFIRMATIVE DEFENSE NO. 8**

11           To the extent applicable, these claims are preempted or otherwise precluded by federal law,  
12 court orders, rulings and judgments.

13       **AFFIRMATIVE DEFENSE NO. 9**

14           To the extent applicable, the second amended complaint, and each cause of action therein,  
15 are barred by the doctrines of mootness and lack of ripeness.

16       **AFFIRMATIVE DEFENSE NO. 10**

17           The second amended complaint, and each cause of action alleged therein, are barred by the  
18 doctrine of laches.

19       **AFFIRMATIVE DEFENSE NO. 11**

20           The second amended complaint is barred by the doctrine of unclean hands, as well as other  
21 applicable equitable doctrines.

22       **AFFIRMATIVE DEFENSE NO. 12**

23           The second amended complaint, and each and every cause of action stated therein, are  
24 barred by the doctrines of estoppel and/or waiver.

25       **AFFIRMATIVE DEFENSE NO. 13**

26           To the extent applicable, the second amended complaint and each cause of action therein  
27 are barred by the failure to precede the action with a claim as required by various Government  
28 Code sections, including but not limited to 945.4, 911.2, 905.2, 950.2, and 810 et seq.

1       **AFFIRMATIVE DEFENSE NO. 14**

2           Defendants have not deprived Plaintiffs of any right guaranteed by law.

3       **AFFIRMATIVE DEFENSE NO. 15**

4           Plaintiffs' claims are barred in whole or in part because the alleged acts or practices of  
5       Defendants do not constitute an illegal act or practice.

6       **AFFIRMATIVE DEFENSE NO. 16**

7           Plaintiffs are not entitled to mandamus relief because there is no clear, present, and  
8       ministerial duty on the part of Defendants, Plaintiffs do not have a clear, present, and beneficial  
9       right to the performance of that duty, defendants have discretion that cannot be directed by the  
10      courts, and an adequate remedy exists at law for Plaintiffs.

11       **AFFIRMATIVE DEFENSE NO. 17**

12           Defendants at all times were acting legitimately in accordance with statutory requirements.  
13       Defendants neither owed nor breached any duty under law to Plaintiffs.

14       **AFFIRMATIVE DEFENSE NO. 18**

15           A writ of mandate may not compel a public official to do an act which violates his or her  
16       statutory duty.

17       **AFFIRMATIVE DEFENSE NO. 19**

18           The second amended complaint and each and every cause of action stated therein, are  
19       barred because at all relevant times, Defendants actions were taken to satisfy applicable  
20       constitutional, judicial, and statutory mandates. Defendants are therefore not liable for any injury  
21       or damages, if any there were.

22       **AFFIRMATIVE DEFENSE NO. 20**

23           There are superseding and intervening actions from third parties. Plaintiffs failed to allege  
24       and/or have not stated facts sufficient to show an affirmative causal link between Defendants'  
25       actions and/or omissions and the alleged violation of Plaintiffs' rights.

26       **AFFIRMATIVE DEFENSE NO. 21**

27           The second amended complaint is barred because Defendants were not aware of any  
28       wrongful conduct, and had no reason to be aware of any wrongful conduct, if any there were.

1       **AFFIRMATIVE DEFENSE NO. 22**

2           To the extent Defendants were aware of any wrongful conduct, if any there was,  
3       Defendants exercised reasonable care to prevent and correct promptly any wrongful conduct, if  
4       any there was.

5       **AFFIRMATIVE DEFENSE NO. 23**

6           To the extent applicable, Defendants are immune from suit under public entity immunity  
7       pursuant to, but not limited to, Government Code §§ 815, 815.2, 818, 818.2, 818.8, 820.4, 820.8,  
8       821.

9       **AFFIRMATIVE DEFENSE NO. 24**

10          Defendants allege that they did not act with the requisite intent to deprive Plaintiffs of  
11       statutory or constitutional rights or to cause any other injury. Defendants therefore allege that  
12       they are immune from liability.

13       **AFFIRMATIVE DEFENSE NO. 25**

14          Plaintiffs have suffered no actual injury due to Defendants' conduct.

15       **AFFIRMATIVE DEFENSE NO. 26**

16          If any wrongful activity occurred, or if Plaintiffs suffered any injury or damages, it was  
17       caused by other parties or persons over whom Defendants had no control.

18       **AFFIRMATIVE DEFENSE NO. 27**

19          To the extent that the second amended complaint herein attempts to predicate liability upon  
20       any public entity, Defendants, or any agent or employee thereof for purported negligence in  
21       retention, hiring, employment, training, or supervision of any public employee, liability is barred  
22       by Government Code sections 815.2 and 820.2 and *Herndon v. County of Marin*, 25 Cal.App.3d  
23       933, 935 36 (1972), reversed on other grounds by *Sullivan v. County of Los Angeles*, 12 Cal.3d  
24       710 (1974); by the lack of any duty running to Plaintiffs; by the fact that any such purported act  
25       or omission is governed exclusively by statute and is outside the purview of any public  
26       employees' authority; and by the failure of any such acts or omissions to be the proximate cause  
27       of any injury alleged in the second amended complaint.

## AFFIRMATIVE DEFENSE NO. 28

To the extent applicable, the second amended complaint and each cause of action alleged therein are barred because the actions complained of were justified and privileged under, but not limited to, the litigation privilege and that described in California Civil Code § 47, as well as the official information privilege, and the Noerr-Pennington doctrine.

## **AFFIRMATIVE DEFENSE NO. 29**

Any and all alleged happenings and events, damages and injuries, if any there were, were proximately caused and contributed to by the negligence or otherwise wrongdoing of Plaintiffs and others, each of whom failed to exercise ordinary care at the times and places alleged in the second amended complaint.

## **AFFIRMATIVE DEFENSE NO. 30**

Plaintiffs' claim for damages is barred to the extent that Plaintiffs had a duty to mitigate, but failed to mitigate, their damages, if any there were.

## **AFFIRMATIVE DEFENSE NO. 31**

The second amended complaint, and each and every cause of action stated therein, fail to state facts upon which an order of attorneys' fees can be granted, and any attorneys' fees are limited by law.

## **AFFIRMATIVE DEFENSE NO. 32**

The second amended complaint and each cause of action alleged therein for declaratory relief are barred because there is no present and actual controversy between the parties.

## AFFIRMATIVE DEFENSE NO. 33

Defendant is not liable for injuries, if any there were, caused by independent contractors, holders of licenses, permits, or other authorizations, or third parties. (Gov. Code, §§ 815.2, 815.4, and 820.8.)

## AFFIRMATIVE DEFENSE NO. 34

Defendant is not vicariously liable for any act or omission of any other person, by way of respondeat superior or otherwise. (Gov. Code, §§ 815.2, 820.8.)

1           **AFFIRMATIVE DEFENSE NO. 35**

2           Defendant is immune from liability for any injury or damages, if any there were, resulting  
3 from the adoption of or the failure to adopt an enactment or from the failure to enforce law.  
4 (Gov. Code, §§ 815.2, 818.2 and 821.)

5           **AFFIRMATIVE DEFENSE NO. 36**

6           Defendant is not liable for any injury or damages, if any there were, resulting from  
7 decisions with respect to licenses, permits, approvals, orders and other authorizations. (Gov.  
8 Code, §§ 818.4 and 821.2.)

9           **AFFIRMATIVE DEFENSE NO. 37**

10          Defendant is not liable for any injury or damages, if any there were, resulting from failure  
11 to discharge any mandatory duties as reasonable diligence was exercised to discharge any duty  
12 there may have been. (Gov. Code, § 815.6.)

13          **AFFIRMATIVE DEFENSE NO. 38**

14          Defendant is not liable for any injury or damages, if any there were, for failure to inspect or  
15 for a negligent inspection of property owned or controlled by a third party. (Gov. Code, §§ 818.6  
16 and 821.4.)

17          **AFFIRMATIVE DEFENSE NO. 39**

18          The complaint and each cause of action therein are barred by the statute of limitations of  
19 Code of Civil Procedure section 342 [relating to claims against public entities] and Government  
20 Code sections 945.4 and 945.6.

21          **AFFIRMATIVE DEFENSE NO. 40**

22          The complaint and each cause of action therein are barred and this court is without  
23 jurisdiction as there has been a failure to exhaust administrative remedies.

24          **AFFIRMATIVE DEFENSE NO. 41**

25          The answering public entity is immune from suit pursuant to Government Code section 815  
26 to the extent that the complaint and each cause of action therein attempt to state a cause of action  
27 not provided by statute against a public entity.

1       **AFFIRMATIVE DEFENSE NO. 42**

2           All acts of defendants, if any there were, occurred in the proper exercise of police powers.

3       **AFFIRMATIVE DEFENSE NO. 43**

4           Defendants have not deprived any person of any right, privilege or immunity guaranteed by  
5           the California Constitution.

6       **AFFIRMATIVE DEFENSE NO. 44**

7           At all relevant times, defendant exercised due care and acted only in the execution or  
8           enforcement of the law.

9       **AFFIRMATIVE DEFENSE NO. 45**

10           There is no liability for any injury or damages, if any there were, resulting from an exercise  
11           of discretion vested in a public employee, whether or not such discretion be abused. (Gov. Code,  
12           §§ 815.2, 820.2.)

13       **AFFIRMATIVE DEFENSE NO. 46**

14           There is no liability in that the acts alleged in the complaint, if done at all, were done in the  
15           execution and enforcement of the law while exercising due care. (Gov. Code, §§ 815.2, 820.4.)

16       **AFFIRMATIVE DEFENSE NO. 47**

17           There is no liability for any injury or damages, if any there were, resulting from acts done  
18           in good faith and without malice under the apparent authority of any enactment, even though said  
19           enactment be unconstitutional, invalid, or inapplicable. (Gov. Code, §§ 815.2, 820.6.)

20       **AFFIRMATIVE DEFENSE NO. 48**

21           There is no liability for any injury or damages, if any there were, caused by a  
22           misrepresentation by any public employee, whether such misrepresentation was negligent or  
23           intentional or not. (Gov. Code, §§ 818.8, 822.2.)

24       **AFFIRMATIVE DEFENSE NO. 49**

25           There is no liability for injury or damages, if any there were, caused by the instituting or  
26           prosecuting of any judicial or administrative proceeding. (Gov. Code, §§ 815.2, 821.6.)

1     **AFFIRMATIVE DEFENSE NO. 50**

2         Insofar as defendants have approved or reviewed subordinates' acts or determinations, such  
3 review and approval was done in a legislative, judicial, or quasi-judicial capacity, within the  
4 scope of discretion, with due care, and with a reasonable and good faith belief that such actions  
5 were in accordance with the Constitution and laws of the United States.

6     **AFFIRMATIVE DEFENSE NO. 51**

7         Defendants have not adopted a rule, regulation, order, or standard of general application  
8 subject to the Administrative Procedure Act's notice and comment provisions. (Gov Code,  
9 sections 11340.5, 11342.600.) Insofar as defendants has promulgated any rule or regulation or  
10 directive, such promulgation was done within the scope of discretion, in good faith, with due care,  
11 and with the intent that such rule or regulation or directive conforms in all respects to the  
12 Constitution and laws of the United States.

13     **AFFIRMATIVE DEFENSE NO. 52**

14         Individual State of California official/employee defendants, including former Attorney  
15 General Becerra, are entitled to absolute and/or qualified immunity.

16     **AFFIRMATIVE DEFENSE NO. 53**

17         Because Plaintiffs' second amended complaint is couched in conclusory terms, answering  
18 Defendants cannot fully anticipate all affirmative defenses that may apply in this case.  
19 In addition, information disclosed during discovery and investigation may indicate additional  
20 defenses that apply in this case. Accordingly, Defendants reserve the right to supplement, alter or  
21 amend this answer to add additional defenses.

22     **WHEREFORE**, defendants pray that:

23         1. Judgment be rendered in favor of defendants; and  
24         2. Complainants take nothing by the second amended complaint; and  
25         3. Defendants be awarded costs of suit incurred herein; and

4. Defendants be awarded such other and further relief as the court may deem necessary and proper.

Dated: June 23, 2021

Respectfully Submitted,

ROB BONTA  
Attorney General of California  
BENJAMIN BARNOUW  
Supervising Deputy Attorney General

Ken Faber

KENNETH G. LAKE  
Deputy Attorney General  
*Attorneys for Defendants and Respondents*  
*California Department of Justice and*  
*Former Attorney General Xavier Becerra*

**DECLARATION OF SERVICE BY ELECTRONIC MAIL**

Case Name: **Franklin Armory, Inc. v. California Department of Justice**  
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. My business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On June 23, 2021, I served the attached **ANSWER TO THE FIRST, SECOND AND EIGHTH CAUSES OF ACTION TO THE SECOND AMENDED COMPLAINT AND PETITION** by transmitting a true copy via electronic mail to the following addresses:

Anna M. Barvir  
Jason A. Davis  
MICHEL & ASSOCIATES, P.C.  
[abarvir@michellawyers.com](mailto:abarvir@michellawyers.com)  
[Jason@calgunlawyers.com](mailto:Jason@calgunlawyers.com)  
[lpalmerin@michellawyers.com](mailto:lpalmerin@michellawyers.com)

*Attorneys for Petitioners-Plaintiffs*

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 June 23, 2021, at Los Angeles, California.

Erica Kelly

Declarant

*Erica Kelly*

Signature

OCT 26 2021  
Sherri R. Cate, Executive Officer/Clerk of Court  
Deputy

Franklin Armory, Inc., et al. vs. California  
Department of Justice, et al., 20STCP01747

Tentative decision on (1) demurral overruled for verification, sustained as to affirmative defenses; (2) motion to strike: denied as moot except to 43<sup>rd</sup> affirmative defense, which is granted

Petitioners Franklin Armory, Inc. ("FAI") and California Rifle & Pistol Association, Incorporated ("Association") demur and move to strike portions of the Answer filed by Respondents California Department of Justice ("DOJ") and Robert A. Bonta, in his capacity as Attorney General.

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

**A. Statement of the Case**

**1. Petition**

Petitioners commenced this action on May 27, 2020. The operative pleading is the Second Amended Complaint ("SAC") filed on February 17, 2021 and alleging causes of action for: (1) declaratory relief; (2) traditional mandamus; (3) tortious interference with contractual relations; (4) tortious interference with prospective economic advantage; (5) negligent interference with a prospective economic advantage; (6) deprivation of liberty without procedural due process of law; (7) deprivation of substantive due process of law; and (8) violation of public policy. The verified SAC alleges in pertinent part as follows.

As of January 1, 2003, licensed firearm dealers in California are required to submit all background checks to DOJ electronically via the Dealer Record of Sale Entry System ("DES"). The DES is a web-based application designed, developed, and maintained by DOJ and used by firearm dealers to report the required information.

The DES can facilitate the transfer of certain types of firearms: "handguns" ("pistols" or "revolvers"), "rifles," and "shotguns." This information is entered into the DES during the application process by the user selecting the appropriate type/subtype of firearm within a predetermined drop-down list. Many firearms do not qualify as handguns, pistols, revolvers, rifles, or shotguns, or even "frames" or "receivers" for said firearms. The DES drop-down list for firearm type/subtype has no provision for "other" firearms such as "undefined firearm subtypes."

Because dealers cannot accurately submit the required information through the DES for "long guns" that are undefined firearm subtypes, they are prohibited from processing and accepting applications from purchasers of said firearms. Respondents have designed the DES with this technological barrier that functions to prohibit the transfer through a licensed firearms dealer of all firearms that are long guns but not rifles, shotguns, or rifle/shotgun combinations.

Respondents have long known about the DES' deficiencies and have refused requests to correct it. Since 2012, FAI has communicated with Respondents about the design and features of its Title 1 firearms that do not fall under the existing DES categories and informed Respondent DOJ of the DES's defects as early as October 24, 2019.

Despite the fact that it has proven it can quickly make the requested change, DOJ has refused to modify the DES. It previously addressed a similar deficiency regarding the drop-down

list for transferee's nation of origin—a deficiency FAI reported at the same time it raised the issue of undefined firearm subtypes—within weeks. Respondents have neither corrected the DES, nor has it implemented alternative procedures to facilitate the lawful transfer of "firearms with an undefined subtype," including but not limited to the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms.

Respondents' motivation in delaying was to buy time to work with the Legislature to develop legislation designating FAI Title 1 style firearms as "assault weapons" and restricting their sale. The scheme proved successful because on August 6, 2020 the Legislature passed Senate Bill 118 ("SB 118"), which 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 of a list of enumerated characteristics, like a forward pistol grip or thumbhole stock. The effect of SB 118 was to restrict FAI's transfer of centerfire versions of FAI Title 1 firearms to customers despite existing orders that long predated SB 118. Even after the adoption of SB 118, not all FAI's Title 1 firearms have been reclassified as assault weapons.

The first cause of action seeks a judicial declaration about the legality of Respondents' conduct regarding the DES and undefined firearm subtypes and an injunction to prevent Respondents from enforcing administrative and/or technological barriers that prevent the sale of lawful "firearms with an undefined subtype," 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 from enforcing the Roberti-Roos Assault Weapons Act in a manner that prohibits those who could have lawfully acquired and registered their FAI Title 1 style firearm but for Respondents' technological barriers.

The second cause of action is for a writ of mandate directing Respondents to design, maintain, and enforce updates to the DES such that it does not proscribe the lawful sale, transfer, and loan of a class of lawful firearms, including FAI's Title 1 firearms. It also asks the court to direct Respondents to design, implement, maintain, and enforce updates to their assault weapons registration process to permit the registration of variants of the FAI Title 1 style firearms by those whose orders were placed on or before August 6, 2020, or such time as deemed appropriate by the court.

The eighth cause of action is for declaratory and injunctive relief for Respondents' violation of the Administrative Procedure Act ("APA"). Petitioners seek a declaration that Respondents' de facto ban on the transfer of undefined firearm subtypes, including but not limited to the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms and barreled action firearms, constitutes an underground regulation in violation of the APA and an injunction preventing enforcement of the underground regulation.<sup>1</sup>

## **2. Course of Proceedings**

On February 25, 2021, the court sustained with leave to amend Respondents' demurrer to the First Amended Complaint ("FAC"). Subsequently, on June 3, 2021, the court overruled Respondents' demurrer to the SAC's first, second, and eight causes of action.

Respondents were directed to file an answer within 20 days. On June 23, 2021, Respondents filed an Answer to the first, second, and eight causes of action of the SAC. The

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<sup>1</sup> The third through seventh causes of action seek damages and have been stayed.

Answer contains 53 affirmative defenses.

## **B. Applicable Law**

### **1. Demurrers**

Demurrers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempels, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A defendant's answer must plead ultimate facts rather than evidentiary detail in the same manner as required for the plaintiff's complaint. See FPI Development, Inc. v. Nakashima, (1991) 213 Cal.App.3d 367, 384. The answer may plead inconsistent defenses. Weil & Brown, California Practice Guide: Civil Procedure Before Trial, (Rutter Group 2002), €:645, 6-96. However, the various affirmative defenses must be separately stated and must refer to the causes of action to which they relate "in a manner by which they may be intelligently distinguished." CCP §431.30(g).

Where an answer is defective, a plaintiff may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempels, (1950) 36 Cal.2d 257. A plaintiff may demur to an answer on any of the following three grounds: (a) the answer fails to state facts sufficient to constitute a defense; (b) the answer is uncertain; and (c) where the answer pleads a contract, it cannot be ascertained whether the contract is oral or written. CCP §430.20. The demurrer may be taken to the entire answer or to one or more of the defenses in the answer. CCP §430.50(b). Unless made within 10 days after service of the answer, the demurrer is waived. CCP §430.40(b).

For all demurrers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.41(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.41(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. Id. The demurring party is responsible for filing and serving a declaration that the meet and confer requirement has been met. CCP §430.41(a)(3).

### **2. Motions to Strike**

Any party, within the time allowed to respond to a pleading, may serve and file a notice of motion to strike the whole or any part thereof. CCP §435(b)(1). The notice of motion to strike shall be given within the time allowed to plead, and if a demurrer is interposed, concurrently therewith, and shall be noticed for hearing and heard at the same time as the demurrer. CRC

3.1322(b). The notice of motion to strike a portion of a pleading shall quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count or defense. CRC 3.1322(a).

The grounds for a motion to strike shall appear on the face of the challenged pleading or form any matter of which the court is required to take judicial notice. CCP §437(a). Matter to be judicially noticed shall be specified in the notice of motion. CCP §437(b). The court then may strike out any irrelevant, false, or improper matter inserted in any pleading and strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. CCP §436. When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend. Perlman v. Municipal Court, (1979) 99 Cal. App. 3d 568, 575.

### **C. Analysis**

Petitioners move to strike the Answer because it is not verified as required by CCP section 1089. Petitioners also demur to Affirmative Defenses 3–42 and 44–53 because they do not state facts sufficient to constitute a defense and are uncertain.<sup>2</sup>

Petitioners have complied with the meet and confer requirements of CCP section 430.41(a). Barvin Decl., ¶¶ 4-12.

#### **1. Unverified Answer**

Petitioners argue that the State's unverified Answer should be stricken because it was not verified as required by CCP section 1089, which permits a respondent to make a return by "demurrer, verified answer or both." Any responsive pleading in a mandamus proceeding that is not a demurrer must be verified or else may be stricken. Universal City Studios, Inc. v. Superior Court, (2003) 110 Cal.App.4<sup>th</sup> 1273, 1287 (unverified return to appellate court's order to show cause was stricken for purposes of mandamus merits but not for motion to seal).

Petitioners rely on People v. Superior Court, ("Alvarado"), (1989) 207 Cal.App.3d 464, 470, as holding that verification in mandate proceedings is required without exception by CCP sections 1086 and 1089.

In Alvarado, the prosecution sought mandamus in the appellate court to compel the superior court to accept an amendment of a criminal complaint. Id. at 467. Alvarado contended that the People's mandamus petition was not verified as required by CCP section 1086. Id. at 469.

The Alvarado court noted that the appellate court in Verzi v. Superior Court, ("Verzi") (1986) 183 Cal.App.3d 382, 385, relied on CCP section 446 to conclude that public agencies and their officers are exempt from verifying a return to an appellate alternate writ. Id. Conversely, the court in Municipal Court v. Superior Court, ("Sinclair"), (1988) 199 Cal.App.3d 19, 25, n.1 concluded that CCP section 446 did not control. Sinclair noted that, while CCP section 446, contained in Part 2 of the CCP, provides that "pleadings" of public entities need not be verified, CCP section 1109, contained in Part 3 of the CCP, states that the provisions of Part 2 apply to mandamus proceedings "[e]xcept as otherwise provided in this title" (Title 1 concerning writs of review, mandate, and prohibition). CCP sections 1086 and 1089 are contained in Title 1 of Part 3

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<sup>2</sup> Petitioners should have filed the demurrer and motion to strike separately. Respondents do not object to their joint presentation.

and require verification of mandamus without exception. Id. at 470. In contrast, CCP section 446 relieves public officers of verification for pleadings that join issues, meaning complaints and answers. Id. Where the paper is to be used as evidence – as is often true for a mandamus petition – it must be verified. Id. (citing Witkin). The Alvarado court concluded that this crucial difference made Sinclair more persuasive authority than Alvarado and that the People's mandamus petition must be verified. Id.

Petitioners acknowledge that Hall v. Superior Court, (2005) 133 Cal.App.4<sup>th</sup> 908, suggests otherwise. In Hall, the court observed in a footnote that government defendants need not verify their answers in writ proceedings where it is used merely to join the issues raised by the petition, citing Verzi, supra, 183 Cal.App.3d at 385, Lertora v. Riley, (1936) 6 Cal.2d 171, 176, and Crowl v. Commission on Professional Competence, (1990) 225 Cal.App.3d 334, 342. 133 Cal.App.4<sup>th</sup> at 914, n. 9. Petitioners criticize all three of these cases as relying on CCP section 446 without considering CCP section 1089's language that a verified answer is required. Mot. at 8-9.

Petitioners contend that Hall therefore is "based on a precedential house of cards" which caused the First Appellate District recently to acknowledge that the question is not settled. in Alfaro v. Superior Court, ("Alfaro") (2020) 58 Cal.App.5<sup>th</sup> 371, 382, n. 8. The Alfaro court did not decide the issue and instead treated the unverified return as a demurrer which admits the facts pleaded in the writ petition. Id. See also Ashmus v. Superior Court, ("Ashmus") (2019) 42 Cal.App.5<sup>th</sup> 1120, 1124, n. 4 (return to appellate OSC was unverified legal brief which, to avoid the catastrophic consequence of striking, the court considered as a demurrer which admits the facts pleaded in the writ petition).

The State responds that Hall is the most recent pronouncement that verification by a public entity or official is not required, doing so in 2005. Trask v. Superior Court, ("Trask") (1994) 22 Cal.App.4<sup>th</sup> 346, 350, n. 3, also did so, stating that an agency may file an unverified answer and then rebut the petitioner's allegations with evidence at hearing. Finally, Epstein v. Superior Court, ("Epstein") (2011) 193 Cal.App.4<sup>th</sup> 1405, held that, while ordinarily an answer to a mandamus petition, like the petition itself, must be verified under CCP section 1089, no verification is required where the answering defendant is a public agency or officer, citing CCP section 446 and 1109. Id. at 1409.<sup>3</sup> Opp. at 2.

The State distinguishes Alvarado as a case requiring that a mandamus petition (not an answer) which is to be used as evidence must be verified, it relied on dictum from another case, Municipal court v. Superior Court, (1988) 199 Cal.App.3d 19, and misstated the Witkin authority on which it relied. Opp. at 3-4. Petitioners reply to these arguments in detail. Reply at 5-7.

The parties' dispute is much ado about nothing. The battle in the appellate cases cited by Petitioners primarily concerns whether an unverified return can be used as evidence. As Epstein explained, a mandamus return in the appellate court is the evidence on which the respondent relies and which the petitioner must controvert in reply. There is no evidentiary hearing, only an oral argument. 193 Cal.App.4<sup>th</sup> at 1409, n. 1. This was the situation in both Ashmus and Alfaro. Mandamus in a trial court involves the presentation of evidence at a trial wholly separate and apart from the petition and answer. Thus, whether the answer is verified at the trial level is not significant.

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<sup>3</sup> The Epstein court distinguished the use of an answer as evidence in the appellate court from the evidence at trial required by Trask in a trial court. 193 Cal.App.4<sup>th</sup> at 1409, n. 1.

As the parties demonstrate, the court can choose which appellate authority to follow. While Petitioners contend that their legal analysis is best, the court will rely on practicality. There is no reason to compel a public agency to find the appropriate official to verify an answer that the agency is not going to rely upon as evidence at trial. This is the reasoning behind CCP section 446 and is the rationale supporting Trask and Epstein. The State need not file a verified answer.

## **2. Affirmative Defenses**

### **a. Demurrer**

As stated *ante*, a defendant's answer must plead ultimate facts rather than evidentiary detail in the same manner as required for the plaintiff's complaint. *See* FPI Development, Inc. v. Nakashima, *supra*, 213 Cal.App.3d at 384.

Petitioners demur to all of the Answer's 53 affirmative defenses except 1, 2, and 43, on the grounds that they fail to plead sufficient facts and offer only legal conclusions. Mot. at 11-12.

The State weakly responds that an affirmative defense need only provide general notice and must be liberally construed. It also requires examination of the compliant because its adequacy is with reference to the complaint's allegations. Many of the affirmative defenses, read together with the SAC's allegations, refer to well-known legal doctrines that do not need reference to a case or statute. Opp. at 4-5.

Petitioners correctly reply that principles of liberal construction, notice pleading, and well-known legal doctrines do not save the State's boilerplate defenses. The defenses must plead ultimate facts in the same manner as Petitioners' claims in the SAC. As Petitioners argue, the "State's failure to give even the most basic factual...support for most of its defenses makes it nearly impossible for Petitioners to guess" what the grounds are. Reply at 10.

### **b. Motion to Strike**

Petitioners move to strike each of the defenses to which they demur, as well as the 43<sup>rd</sup> affirmative defense to which they did not demur. The basis of the motion to strike is that the defenses are irrelevant or improper. Mot. at 13-19.

The motion to strike is moot as to those affirmative defenses to which the demurrer has been sustained. This leaves only the Forty Third Affirmative Defense, which alleges that the Respondents have not deprived any person of any right, privilege or immunity guaranteed by the California Constitution. Petitioners explain that this defense is irrelevant because they have never claimed any violation of the California Constitution. Mot. at 15.

## **D. Conclusion**

The demurrer for failure to verify the Answer is overruled. The demurrer to the affirmative defenses is sustained. The motion to strike is moot as to all but the 43<sup>rd</sup> affirmative defense, to which it is granted. The State has 15 days leave to amend its Answer's affirmative defenses.

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Exempt from filing fees pursuant to Government Code section 6103

10

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

14

15  
16 **FRANKLIN ARMORY, INC. AND**  
17 **CALIFORNIA RIFLE & PISTOL**  
18 **ASSOCIATION, INCORPORATED,**  
19 Petitioners-Plaintiffs,

Case No. 20STCP01747

20  
21 **NOTICE OF MOTION AND MOTION**  
22 **TO DISMISS THE FIRST, SECOND AND**  
23 **EIGHTH CAUSES OF ACTION IN THE**  
24 **SECOND AMENDED COMPLAINT AND**  
25 **PETITION; MEMORANDUM OF**  
26 **POINTS AND AUTHORITIES**

27  
28 **[DECLARATIONS OF CHERYLE**  
29 **MASSARO-FLOREZ AND MARICELA**  
30 **LEYVA AND REQUEST FOR JUDICIAL**  
31 **NOTICE IN SUPPORT OF THE**  
32 **MOTION TO DISMISS FILED**  
33 **SEPARATELY]**

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

Respondents-Defendants

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

Honorable James C. Chalfant

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on January 27, 2022, at 9:30 a.m., in Department 85 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California, 90012, 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 will move the Court for an Order dismissing the First, Second and Eighth causes of action to the Second Amended Complaint and Petition.

Said motion will be made, pursuant to the Court’s inherent authority to dismiss nonjusticiable claims and to control litigation before it, on the ground that Defendant/Respondent California Department of Justice (DOJ) has modified the electronic system the DOJ utilizes to process applications for firearm transactions to remove the alleged “technological barrier” to the firearm transactions at issue in this case, which renders moot the writ of mandate, declaratory relief and injunctive relief Plaintiffs/Petitioners Franklin Armory, Inc. and the California Rifle & Pistol Association, Incorporated seek in their First, Second and Eighth causes of action.

This motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declarations of Cheryle Massaro-Florez and Maricela Leyva filed concurrently, the Request for Judicial Notice filed concurrently, on the pleadings and records on file herein, and on such other matters as may be presented at the hearing.

Dated: November 29, 2021

Respectfully Submitted,

ROB BONTA  
Attorney General of California

Benjamin Barnouw

BENJAMIN BARNOUW

## Supervising Deput

KENNETH G. LAKE

Deputy Attorney General

### *Attorneys for Defendants*

*State of California, acting*

*the California Department*

*Former Attorney General*

*in his personal capacity of*

### *General Rob Bonta in his l*

*only*

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## Eighth Causes of Action in Second

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## INTRODUCTION

Plaintiffs/Petitioners Franklin Armory, Inc. (Franklin Armory) and the California Rifle & Pistol Association, Incorporated (Association)<sup>1</sup> seek a writ of mandate and declaratory and injunctive relief based on allegations that they have been unable to engage in transactions involving “firearms with an undefined subtype,” also sometimes referred to as “other” firearms, because there is an alleged “technological barrier” to processing transactions for such firearms in the electronic system the DOJ utilizes to process applications for firearm transactions. These claims are moot because the DOJ has modified the electronic system to remove the alleged “technological barrier.” In fact, the DOJ made the specific modification suggested in Petitioners’ Second Amended Complaint and Petition, which is to add an “Other” option for “gun type.” The modification was deployed on October 1, 2021.

Based on discussions between the parties’ counsel, it appears that Petitioners contend their claims are not moot because they are concerned the DOJ will issue notices or bulletins that improperly restrict the use of the “Other” option. Petitioners’ concerns are groundless. Petitioners raised concerns with respect to a bulletin posted by the DOJ on September 27, 2021, which they interpreted as exempting firearms at issue in this lawsuit from the use of the “Other” option. When DOJ was alerted to the situation, it promptly issued another bulletin that superseded the first one and used modified language to avoid any misinterpretation. This second bulletin was posted on September 30, 2021, before the “Other” option was deployed. Petitioners’ concerns about bulletins or notices issued by the DOJ are also irrelevant because such activity is not the subject of their petition for writ of mandate or related claims for declaratory and injunctive relief. The configuration of the DES is the subject of these claims.

In sum, the DOJ has modified the DES so that there is no longer any alleged “technological barrier” to the processing of transactions involving the firearms at issue in this lawsuit, and thus Petitioners’ claims for a writ of mandate and declaratory and injunctive relief are moot and should be dismissed.

<sup>1</sup> Franklin Armory and the Association will be collectively referred to as “Petitioners.”

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. HISTORY OF PETITIONERS' LAWSUIT

Petitioners' original Complaint and Petition (Complaint) focused on a Franklin Armory firearm designated as the "Title 1," which did not fit within any of the statutory firearm type definitions of "pistol"/"handgun," "rifle" or "shotgun." (Complaint at p. 2, ¶2.) Although Franklin Armory now alleges there are two Title 1 variants, one of which is a "centerfire" firearm and the other of which is a "rimfire" firearm (Second Amended Complaint and Petition (SAC) at p. 2, ¶2), the original Complaint only concerned the "centerfire" model. The centerfire Title 1 was subsequently classified as an "assault weapon" under Penal Code section 30515. Section 30515 was amended, effective September 1, 2020, to include in the definition of "assault weapon" any "semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun" that has one or more specified characteristics. (Pen. Code, §30515, subds. (a)(9),(10),(11).) As a result, Franklin Armory's centerfire Title 1 was banned and could not legally be processed through the DES.<sup>2</sup>

After this occurred, Petitioners filed a First Amended Complaint and Petition (FAC), in which they acknowledged that the centerfire Title 1 was a banned “assault weapon.” (FAC at p. 21, ¶105.) Nonetheless, they continued to assert a writ petition and related claims based on the “Title 1,” as well as on other, unidentified firearms. (See, e.g., FAC at p. 25, ¶125.) The DOJ filed a demurrer, which was sustained by the Court. The Court held that Petitioners’ claims based on the Title 1 were moot because it was classified as an assault weapon and could not legally be processed through the DES, and any order permitting the transfer of a Title 1 would violate California law. (Decision on Demurrer, filed January 28, 2021,<sup>3</sup> at pp. 5-6.) In opposing the demurrer, Franklin Armory claimed that its allegations concerning the “Title 1” concerned two versions of the Title 1, the banned “centerfire” version and a “rimfire” version that was not

<sup>2</sup> Any individual who obtained, prior to September 1, 2020, a firearm that is defined as an assault weapon under Penal Code section 30515, subdivisions (a)(9), (10) and (11), is allowed to keep the firearm if they meet certain eligibility requirements, but they must register the firearm with the DOJ by January 1, 2022. (Pen. Code, §30685.) To register, an individual must submit an application to the DOJ pursuant to a process to be established by the DOJ in a regulation. (Pen. Code, §30900, subd. (c).)

<sup>3</sup> The Court's Decision is attached to the Request for Judicial Notice filed in support of this motion.

1 banned because it did not fit the definition of an assault weapon. The Court rejected that  
2 argument. (*Id.* at p. 5.) The Court held that Petitioners had failed to allege standing to pursue  
3 claims based on other, unidentified firearms. (*Id.* at p. 7.)

4 **II. PETITIONERS' SECOND AMENDED COMPLAINT AND PETITION**

5 Petitioners filed their Second Amended Complaint and Petition on February 17, 2021. They  
6 allege the existence of a different Franklin Armory firearm also designated with the model name  
7 "Title 1," which they describe as a ".17 WSM (a rimfire caliber)." (SAC at p. 2, ¶2.) They allege  
8 this rimfire Title 1 firearm does not fit within any of the statutory firearm type definitions  
9 "pistol"/"handgun," "rifle" or "shotgun." (SAC at p. 2, ¶2.) Petitioners also identified three other  
10 categories of firearms - buntline revolvers, butterfly grip firearms, and barreled action firearms -  
11 they allege do not fit within any of the statutory firearm type definitions "pistol"/"handgun,"  
12 "rifle" or "shotgun." (SAC at p. 2, ¶4.)

13 The Second Amended Complaint and Petition asserts nine causes of action. This Motion to  
14 Dismiss addresses the First, Second and Eighth causes of action; all the other causes of action  
15 have been stayed. The Second cause of action seeks a writ of mandate, and the First and Eighth  
16 causes of action seek declaratory and injunctive relief.

17 All of these causes of action are premised on Petitioners' allegation that firearms that do not  
18 fit within any of the statutory definitions of recognized firearm types – "pistol"/"handgun," "rifle"  
19 and "shotgun" -- cannot be sold or otherwise transferred in California because of a "technological  
20 barrier" in the Dealer Record of Sale Entry System ("DES") which is utilized by dealers and the  
21 DOJ to process applications for firearm transactions. (SAC at p. 16, ¶58.) Petitioners allege as  
22 follows:

23 58. Specifically, by design, when the DES user is inputting the designated  
24 information into the DES, they must input information related to the gun type ("long  
25 gun" or "handgun") from a pre-populated dropdown list. Upon selecting "long gun,"  
26 the DES is designed to and functions to self-populate a subset of fields, and it requires  
27 one of three options to be designated before the dealer may proceed with the  
28 completion of the form and submission of the required information to the DOJ. Those  
three options are: "rifle," "rifle/shotgun," "shotgun." Unlike the subset of fields that  
self-populate for "Color," "Purchaser Place of Birth," and Seller Place of Birth", each  
of which contains the catchall "other" options, the "long guns" subset of fields does  
not contain the "other" option. Thus, the DES prevents licensed firearm dealers from  
proceeding with the sale, transfer, loan or submission of information to the DOJ for

1 certain firearms, including but not limited to the FAI [Franklin Armory] Title I series  
2 of firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms.

3 59. The actual and practical effect of this design is that licensed California firearm  
4 dealers cannot accurately submit the necessary information to the DOJ for processing  
5 because of the limited choices of subtypes in the DES, thereby barring the sale,  
transfer, acquisition, loan or other processing of “firearms with an undefined  
subtype,” including but not limited to the FAI Title 1 series of firearms, buntline  
revolvers, butterfly grip firearms, and barreled action firearms.

6 (SAC at p. 16, ¶¶58-59.) Petitioners refer to the configuration of the DES as a “technological  
7 barrier,” alleging that “[a]s part of the design, implementation, maintenance and enforcement of  
8 the DES by the DEFENDANTS, the DEFENDANTS have instituted a technological barrier that  
9 functions and serves as a ban on the transfer of all ‘firearms with an undefined subtype’ that are  
10 ‘long guns’ that are neither ‘rifles’ nor ‘shotguns’ nor ‘rifle/shotgun combinations’ through a  
11 licensed California firearms dealer.” (SAC at p. 17, ¶63.)

12 In their Petition for Writ of Mandate (Second cause of action), Petitioners seek an order  
13 “commanding DEFENDANTS to design, implement, maintain and enforce updates to the DES  
14 such that it does not proscribe the lawful sale, transfer and loan of an entire class of lawful  
15 firearms, including but not limited to rimfire variants of the FAI Title 1 series of firearms,  
16 buntline revolvers, butterfly grip firearms, and barreled action firearms, and such that it comports  
17 with Penal Code sections 28155, 28205, 28215 and 28220.”<sup>4</sup> (SAC at p. 29, ¶127.)

18 In the First cause of action titled “Declaratory and Injunctive Relief,” Petitioners seek  
19 various declarations regarding the DES and the alleged “technological barrier,” including the  
20 following:

21 • The DES, as it is currently designed, implemented, maintained and/or enforced by  
22 DEFENDANTS prohibits the sale of certain firearms that are neither “rifles,” nor  
23 “shotguns,” nor “handguns” under California law.

24 <sup>4</sup> Petitioners also seek writ relief requiring the DOJ to process sales of the centerfire Title  
25 1 to any individual who placed a “deposit” on the firearm on or before August 6, 2020. (SAC at  
26 pp. 27-28, ¶¶123, 128.) However, the Court has already ruled that Petitioners’ writ petition  
27 related to the centerfire Title 1 is moot, and that an order permitting transfers of that firearm  
28 would contravene California law. (Decision on Demurrer, filed January 28, 2021, at pp. 5-6.) Petitioners concede that the Court has already ruled against them on this claim and have explained that they “kept this claim in the SAC to avoid waiving any right to appeal the Court’s ruling.” (Opposition to Demurrer to Second Amended Complaint at p. 8, fn. 2 [a copy of the Opposition is attached to the Request for Judicial Notice].)

1                     • DEFENDANTS' actions in designing, implementing, maintaining and enforcing the  
2                     DES, in its current form, constitute a barrier and prevent FAI, licensed dealers and  
3                     the general public from acquiring, possessing, transferring and selling certain lawful  
4                     firearms, including but not limited to the FAI Title 1 series of firearms, buntline  
5                     revolvers, butterfly grip firearms, and barreled action receivers, within the State of  
6                     California.

7                     • The DES's technological restrictions prohibiting the transfer of certain lawful  
8                     firearms, including but not limited to the FAI Title 1 series of firearms, buntline  
9                     revolvers, butterfly grip firearms, and barreled action receivers, violate the DOJ's  
10                    duties, including those found within Penal Code sections 28155, 28205, 28215, and  
11                    28220.

12                    (SAC at pp. 25-26, ¶118.) In the First cause of action, Petitioners also seek an injunction  
13                    “enjoining DEFENDANTS, their agents, employees, representatives and all those acting in  
14                    concert with [sic] from enforcing administrative and/or technological barriers that prevent the sale  
15                    of lawful ‘firearms with an undefined subtype,’ including but not limited to rimfire variants of the  
16                    FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms, and barreled action  
17                    firearms.” (SAC at p. 26, ¶119.)<sup>5</sup>

18                    In the Eighth cause of action, titled “For Declaratory and Injunctive Relief - Validity of  
19                    Non-Statutory Ban on Lawful Product Via Technological Barriers,” Petitioners allege that the  
20                    DOJ has created or enforced a “rule of general applicability” that prohibits the sale of “firearms  
21                    with an undefined subtype,” and that because this “rule” was not promulgated in accordance with  
22                    the Administrative Procedure Act, it constitutes an illegal “underground regulation.” (SAC at pp.  
23

24                    \_\_\_\_\_  
25                    <sup>5</sup> Petitioners also request an injunction requiring the DOJ to process sales of the centerfire  
26                    Title 1 to any individual who placed a “deposit” on the firearm on or before August 6, 2020.  
27                    (SAC at p. 26, ¶120.) However, the Court has already ruled that Petitioners' claim for injunctive  
28                    relief related to the centerfire Title 1 is moot, and that an order permitting transfers of that firearm  
                          would contravene California law. (Decision on Demurrer, filed January 28, 2021, at pp. 5-6.)  
                          Petitioners have conceded that the Court has already ruled against them on this claim and have  
                          represented that they “kept this claim in the SAC to avoid waiving any right to appeal the Court's  
                          ruling.” (Opposition to Demurrer to Second Amended Complaint at p. 8, fn. 2.)

1 37-38, ¶¶186-190.) Petitioners allege that “[t]he rule was created by DOJ for the purpose of  
2 submitting specific information to the DOJ and for processing registrations and background  
3 checks via the DES, a system administered by the DOJ pursuant to the Penal Code.” (SAC at p.  
4 38, ¶188.) Petitioners seek a declaration that the DOJ has instituted an illegal “underground  
5 regulation.” (SAC at p. 38, ¶192.) Petitioners also possibly seek an injunction in this cause of  
6 action, although they do not specify what conduct they seek to enjoin. (SAC at p. 38, ¶194.)

7 **III. THE DEPARTMENT OF JUSTICE HAS MODIFIED THE DES**

8 The DOJ has modified the DES by adding an “Other” option under the “gun type” menu.  
9 (Decl. of Cheryl Massaro-Florez at ¶6; Decl. of Maricela Leyva at ¶4; see Joint Stipulation and  
10 Order, filed Nov. 23, 2021,<sup>6</sup> at p. 4, line 24 – p. 5, line 6 [acknowledging modification of DES].)  
11 This is precisely the modification that Petitioners have alleged would satisfy their claims for writ,  
12 declaratory and injunctive relief. (See SAC at p. 17, ¶64 [“This technological barrier could be  
13 alleviated if the DES provided the ‘other’ option for ‘long guns’”]; p. 16, ¶58 [“Unlike the subset  
14 of fields that self-populate for ‘Color,’ ‘Purchaser Place of Birth,’ and [‘]Seller Place of Birth’,  
15 each of which contains the catchall ‘other’ options, the ‘long guns’ subset of fields does not  
16 contain the ‘other’ option”].)

17 The modification was deployed on October 1, 2021. (Decl. of Cheryl Massaro-Florez at ¶6;  
18 Decl. of Maricela Leyva at ¶4.) Prior to the deployment, the DOJ posted announcements on the  
19 DES to notify firearms dealers about the modification. (Decl. of Maricela Leyva at ¶¶5, 9 and  
20 Exhibits “A” and “B.”)

21 The project to modify the DES involved more than simply adding an option on a drop-  
22 down menu in the DES. To account for the fact that firearms can now be categorized as “other,”  
23 additional modifications were made to the DES. (Decl. of Cheryl Massaro-Florez at ¶8.) In  
24 addition, modifications were required for several internal DOJ applications and databases,  
25 including the Consolidated Firearms Information System, the DROS application, a middleware  
26 program known as the Consolidated Firearms Interface Gateway, the Automated Firearms

27  
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<sup>6</sup> The Joint Stipulation and Order, filed November 23, 2021, is attached to the Request for  
Judicial Notice filed in support of this motion.

1 System, and the Armed and Prohibited Persons System. (Decl. of Cheryl Massaro-Florez at ¶¶9-  
2 13, 17.) Modifications were also required for a website known as the California Firearms  
3 Application Reporting System. (Decl. of Cheryl Massaro-Florez at ¶¶14-16.)

4 **IV. ARGUMENT**

5 **A. The Court Has the Power to Dismiss Claims for Writ, Declaratory and  
6 Injunctive Relief That Are Moot**

7 “California courts will decide only justiciable controversies.” (*Wilson & Wilson v. City*  
8 *Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) One component of justiciability is  
9 mootness. (*Ibid.*) Moot cases are “[t]hose in which an actual controversy did exist but, by the  
10 passage of time or a change in circumstances, ceased to exist.” (*Ibid.* [quoting 3 Witkin, Cal.  
11 Procedure (5th ed. 2008) Actions, § 21, pp. 85, 86].) “When events render a case moot, the court,  
12 whether trial or appellate, should generally dismiss it.” (*Wilson & Wilson, supra*, 191 Cal.App.4th  
13 at p. 1575.) “[A] trial court may, under certain circumstances, invoke its limited, inherent  
14 discretionary power to dismiss claims with prejudice.” (*Lyons v. Wickhorst* (1986) 42 Cal.3d 911,  
15 915.) A “nonjusticiable controversy” has been recognized as a ground for such a dismissal. (*Id.* at  
16 p. 915, fn. 4.) “It is also well established that, independent of any statutory authority, courts have  
17 fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to  
18 control litigation before them.” (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.)

19 “If the evidence, including facts arising after the writ petition is filed, ‘demonstrates the  
20 [respondent’s] “willingness to perform without coercion, the writ [of mandate] may be denied as  
21 unnecessary; and if [the respondent] shows actual compliance, the proceeding will be dismissed  
22 as moot.” [Citation.] No purpose would be served in directing the [respondent] to do what has  
23 already been done.’” (*TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 147-  
24 148 [quoting *State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 742]; see *County of San*  
25 *Diego v. State of California* (2008) 164 Cal.App.4th 580, 595-596 [writ was improperly granted  
26 where the petitioners would obtain the same relief under a statute enacted after the writ petition  
27 was filed]; *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 417 [county’s resolution adopted  
28 during the case which increased level of dental care it would provide to indigent residents showed

1 good faith willingness to perform and made issuance of writ inappropriate]; *California Teachers  
2 Assn. v. Ingwerson* (1996) 46 Cal.App.4th 860, 873–874 [holding trial court erred in issuing a  
3 writ because “the issue of whether the county was required to adopt a budget, as a matter of law,  
4 had become moot because it had already complied with the duty imposed on it by law”].)

5 The rule also applies to claims for declaratory relief. (See *Giraldo v. Department of  
6 Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 257 [affirming dismissal of  
7 plaintiff’s claims for declaratory and injunctive relief regarding prison conditions as moot after  
8 the plaintiff’s release from prison]; *City of Los Angeles v. County of Los Angeles* (1983) 147  
9 Cal.App.3d 952, 959 [dismissing appeal from a judgment of declaratory and injunctive relief  
10 where the issues were rendered moot by the passage of Proposition 13].) In addition, declaratory  
11 relief is proper only where there is an “actual controversy relating to the legal rights and duties of  
12 the respective parties” (Code Civ. Proc., §1060), and where a respondent’s actions or other  
13 circumstances render claims for declaratory relief moot, there is no “actual controversy” under  
14 section 1060. Furthermore, Code of Civil Procedure section 1061 grants courts the express power  
15 to “refuse to exercise the power granted by this chapter [including section 1060] in any case  
16 where its declaration or determination is not necessary or proper at the time under all the  
17 circumstances.”

18 Claims for injunctive relief can also be dismissed as moot. (See *Giraldo, supra*, 168  
19 Cal.App.4th at p. 257 [affirming dismissal of plaintiff’s claims for declaratory and injunctive  
20 relief regarding prison conditions as moot after the plaintiff’s release from prison]; *City of Los  
21 Angeles, supra*, 147 Cal.App.3d at p. 959 [dismissing appeal from a judgment of declaratory and  
22 injunctive relief where the issues were rendered moot by the passage of Proposition 13].)

23 **B. Petitioners’ Petition for Writ of Mandate Is Moot**

24 In their Petition for Writ of Mandate (Second cause of action), Petitioners seek an order  
25 “commanding DEFENDANTS to design, implement, maintain and enforce updates to the DES  
26 such that it does not proscribe the lawful sale, transfer and loan of an entire class of lawful  
27 firearms, including but not limited to rimfire variants of the FAI Title 1 series of firearms,  
28 buntline revolvers, butterfly grip firearms, and barreled action firearms, and such that it comports

1 with Penal Code sections 28155, 28205, 28215 and 28220.” (SAC at p. 29, ¶127.) Petitioners  
2 allege that all of these firearms do not fit within any of the statutory firearm type definitions  
3 “pistol”/“handgun,” “rifle” or “shotgun.” (SAC at p. 2, ¶¶2, 4.) The only aspect of the DES that  
4 allegedly hinders transactions involving these firearms is that, for transactions involving a “long  
5 gun,” the DES offers only three options in the “gun type” field, namely, “rifle,” “rifle/shotgun,”  
6 and “shotgun.” (SAC at p. 16, ¶58.)

7 This claim is now moot because, as is established in the declarations submitted in support  
8 of this motion, the DES now has an “Other” option for the “gun type” field. (Decl. of Cheryl  
9 Massaro-Florez at ¶6; Decl. of Maricela Leyva at ¶4; see Joint Stipulation and Order, filed Nov.  
10 23, 2021, at p. 4, line 24 – p. 5, line 6 [acknowledging modification of DES].) Notably,  
11 Petitioners have referred to configuration of the DES as a “technological barrier” (SAC at p. 17,  
12 ¶63), and alleged that the modification to the DES which the DOJ has now deployed would  
13 alleviate this technological barrier: “This technological barrier could be alleviated if the DES  
14 provided the ‘other’ option for ‘long guns.’” (SAC at p. 17, ¶64.) Petitioners do not allege any  
15 other aspect of the DES that hinders the processing of transactions for these firearms.

16 Petitioners apparently argue their claims are not moot because the DOJ could in the future  
17 issue notices or bulletins that improperly restrict the use of the “Other” option. Petitioners  
18 specifically raised concerns with a bulletin issued by the DOJ on September 27, 2021, which they  
19 interpreted as exempting some of the firearms at issue in this matter from being processed under  
20 the “Other” option. (See Joint Stipulation and Order, filed Nov. 23, 2021, at p. 4, line 9.)  
21 Petitioners’ argument is baseless. The bulletin issued on September 27, 2021, and the bulletin  
22 issued on September 30, 2021, which superseded the first bulletin, are both attached to the  
23 Declaration of Maricela Leyva submitted in support of this motion. The DOJ acknowledges that  
24 the bulletin posted on September 27, 2021, was imprecise. (Decl. of Maricela Leyva, at ¶8.)  
25 Specifically, the bulletin was intended to remind firearms dealers that some firearms that could  
26 otherwise be considered to fall into the “Other” category fit within the definition of an “assault  
27 weapon” set forth in Penal Code section 30515, subdivision (a), paragraphs (9), (10), and (11).  
28 (*Id.* at ¶8 and Exh. “A.”) Thus, the Bulletin quoted those paragraphs in full. (*Id.* at ¶8 and Exh.

1       “A.”) All three paragraphs apply to a “semiautomatic centerfire firearm that is not a rifle, pistol,  
2 or shotgun,” that has specified features; the feature in paragraph (10) is that the firearm “has a  
3 fixed magazine with the capacity to accept more than 10 rounds”; and the feature in paragraph  
4 (11) is that the firearm “has an overall length of less than 30 inches.” (Pen. Code, § 30515, subds.  
5 (a)(9)-(11).) To highlight these two paragraphs, the Bulletin included the following note: “Note:  
6 Prior to the sale, loan, or transfer of an ‘Other’ type firearm you must confirm: 1. That it has a  
7 fixed magazine that accepts 10 rounds or fewer. 2. That it has an overall length of 30 inches or  
8 more.” (Decl. of Maricela Leyva, at ¶8 and Exh. “A.”) However, the note was imprecise because  
9 it inadvertently failed to specify that the limitations only apply to “semiautomatic centerfire  
10 firearms.” (*Id.* at ¶8 and Exh. “A.”) The bulletin did quote the text of Penal Code section 30515,  
11 subdivisions (a)(9)-(11), which state that the restrictions only apply to “semiautomatic centerfire  
12 firearms” (*Id.* at ¶8 and Exh. “A”), thus a firearms dealer reading the bulletin would understand  
13 that the restrictions only applied to “semiautomatic centerfire firearms.” In any event, when the  
14 DOJ was alerted that the first bulletin was imprecise, it promptly issued a bulletin that superseded  
15 the first bulletin and removed the imprecise language. (*Id.* at ¶9 and Exh. “B.”) The second  
16 bulletin was posted on September 30, 2021, before the “Other” option was deployed. In sum,  
17 when the DOJ was notified of an alternative and unintended interpretation of the bulletin, it  
18 promptly issued a superseding bulletin that clarified the issue. This does not show that the DOJ  
19 will in the future issue notices or bulletins that improperly limit the use of the “Other” option.

20       Moreover, Petitioners’ complaints about notices or bulletins issued by the DOJ are beyond  
21 the scope of their petition for writ of mandate. Petitioners’ writ petition is premised on the theory  
22 that Penal Code sections 28155, 28205, 28215 and 28220 establish a mandatory, ministerial duty  
23 on the DOJ with respect to the configuration and capability of the DES. Those statutes do not  
24 address any duties with respect to notices or bulletins issued by the DOJ.

25       In conclusion, the writ petition in this case addresses the configuration of the DES and the  
26 DOJ has addressed the alleged problem with the DES. Accordingly, the writ petition is moot.

27       **C. Petitioners’ Claims for Declaratory Relief Are Moot**

28       In their First cause of action, Petitioners seek the following declaratory relief:

1 (a) "There exists a category of firearm that is neither a 'rifle,' nor 'shotgun,' nor 'handgun'  
2 under California law."

3 (b) "The DES, as it is currently designed, implemented, maintained and/or enforced by  
4 DEFENDANTS, prohibits the sale of certain firearms that are neither 'rifles,' nor  
5 'shotguns,' nor 'handguns' under California law."

6 (c) "DEFENDANTS' actions in designing, implementing, maintaining and enforcing the  
7 DES, in its current form, constitute a barrier and prevent FAI, licensed dealers and the  
8 general public from acquiring, possessing, transferring and selling certain lawful firearms,  
9 including but not limited to the FAI Title 1 series of firearms, buntline revolvers, butterfly  
10 grip firearms, and barreled action receivers, within the State of California."

11 (d) "The DES's technological restrictions prohibiting the transfer of certain lawful firearms,  
12 including but not limited to the FAI Title 1 series of firearms, buntline revolvers, butterfly  
13 grip firearms, and barreled action receivers, violate the DOJ's duties, including those found  
14 within Penal Code sections 28155, 28205, 28215, and 28220."

15 (e) "The DES, as it is currently designed, implemented, maintained and/or enforced, is not  
16 in compliance with the mandate imposed by Penal Code sections 28155, 28205, 28215, and  
17 28220."

18 (f) "DEFENDANTS have intentionally instituted the technological barriers designed for  
19 and implemented within DES, which is maintained and enforced by the DEFENDANTS."

20 (g) "DEFENDANTS have intentionally delayed in removing the technological barriers  
21 designed for and implemented within DES, which is maintained and enforced by the  
22 DEFENDANTS."

23 (h) "DEFENDANTS . . . have a clear, present and ministerial duty to ensure that the  
24 systems developed by the DOJ to facilitate the submission of information do not act as  
25 barriers to the submission of the required information necessary for the sale, loan and/or  
26 transfer of lawful firearms."

27 (SAC at pp. 25-26, ¶118.) In addition, in their Eighth cause of action, Petitioners seek a  
28 declaration as follows: "A judicial declaration of the legality of DEFENDANTS' conduct, and

1 whether the regulation barring application for, sale of, delivery of, and possession of lawful  
2 ‘firearms with an undefined subtype,’ including but not limited to the FAI Title 1 series of  
3 firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms, constitutes an  
4 invalid underground regulation in violation of the APA is necessary and appropriate at this time.”  
5 (SAC at p. 38, ¶192.)

6 All of the requests for declaratory relief are moot because, as is established in the  
7 declarations attached to this motion, the DES now has an “Other” option for the “gun type” field.  
8 (Decl. of Cheryl Massaro-Florez at ¶6; Decl. of Maricela Leyva at ¶4.) All of the declaratory  
9 relief Petitioners seek is premised on their outdated allegations that for transactions involving a  
10 “long gun,” the DES offers only three options in the “gun type” field, namely, “rifle,” “shotgun”  
11 and “rifle/shotgun” (SAC at p. 16, ¶58), which hinders transactions for the firearms at issue in  
12 this case because those firearms do not fit within any of the statutory firearm type definitions  
13 “pistol”/“handgun,” “rifle” or “shotgun” (SAC at p. 2, ¶¶2, 4). The purported “rule” which  
14 allegedly constitutes an invalid underground regulation is the configuration of the DES, which  
15 allegedly “prohibit[s] the sale of certain firearms that are neither ‘pistols,’ nor ‘rifles,’ nor  
16 ‘shotguns,’ under California law.” (SAC at p. 37, ¶186; see SAC at p. 38, ¶188 [“The rule was  
17 created by DOJ for the purpose of submitting specific information to the DOJ and for processing  
18 registrations and background checks via the DES, a system administered by the DOJ pursuant to  
19 the Penal Code.”].)

20 Petitioners’ declaratory relief claims are moot because the alleged “technological barrier”  
21 which their case is based upon no longer exists. (See SAC at p. 17, ¶64 [“This technological  
22 barrier could be alleviated if the DES provided the ‘other’ option for ‘long guns’”].) Petitioners  
23 do not allege any other aspect of the DES creates a barrier to processing transactions for the  
24 firearms at issue in this lawsuit. Thus, there is no “actual controversy” which can properly be the  
25 subject of declaratory relief. (Code Civ. Proc., § 1060; see *Alliance for California Business v.*  
26 *State Air Resources Bd.* (2018) 23 Cal.App.5th 1050, 1068 [“A declaratory relief action requires  
27 an actual controversy relating to the legal rights and duties of the respective parties”].)

28 Even if Petitioners argue that there is an “actual controversy” about the DES as it was

1 *previously configured, the Court should exercise its discretion to refuse to issue a declaration*  
2 *because, based on Petitioners’ own allegations, the “firearms with an undefined subtype” which*  
3 *are at issue in this case can now be processed through the DES. A declaration relating to a past*  
4 *configuration of the DES would be improper because “[d]eclaratory relief operates*  
5 *prospectively to declare future rights, rather than to redress past wrongs. [Citation.] A declaratory*  
6 *judgment ‘serves to set controversies at rest before they lead to repudiation of obligations,*  
7 *invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of*  
8 *preventive justice, to declare rights rather than execute them.’ [Citations.]’’’ (County of San*  
9 *Diego, *supra*, 164 Cal.App.4th at pp. 607-608 [citations omitted]; see Code Civ. Proc., § 1061*  
10 *[granting courts the authority to “refuse to exercise the power granted by this chapter [including*  
11 *section 1060] in any case where its declaration or determination is not necessary or proper at the*  
12 *time under all the circumstances”].)*

13       Finally, the Court should reject any argument Petitioners make that their claims are not  
14       moot because the DOJ could in the future issue notices or bulletins that improperly restrict the use  
15       of the “Other” option. Petitioners’ contention that a September 27, 2021, bulletin posted by the  
16       DOJ was an attempt to improperly restrict the use of the “Other” option is groundless. (Decl. of  
17       Maricela Leyva, at ¶¶8-9, and Exhs. “A” and “B.”) Furthermore, Petitioners’ Second Amended  
18       Complaint and Petition does not include any allegations regarding notices or bulletins issued by  
19       the DOJ, and thus any relief involving notices or bulletins would be beyond the scope of  
20       Petitioners’ current claims.

21       **D. Petitioners’ Request for Injunctive Relief Is Moot**

22       In the First cause of action, Petitioners also seek an injunction “enjoining DEFENDANTS,  
23       their agents, employees, representatives and all those acting in concert with [sic] from enforcing  
24       administrative and/or technological barriers that prevent the sale of lawful ‘firearms with an  
25       undefined subtype,’ including but not limited to rimfire variants of the FAI Title 1 series of  
26       firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms.” (SAC at p. 26,  
27       ¶119.) In their Eighth cause of action, Petitioners allege “DEFENDANTS’ unlawful conduct has  
28       caused, and unless enjoined by this Court, will continue to cause irreparable injury to

1 PLAINTIFFS, as well as their members and customers.” (SAC at p. 38, ¶194.) It is unclear  
2 whether this is a request for an injunction and, if so, what the terms of the requested injunction  
3 would be.

4 Petitioners’ request for injunctive relief is premised on their allegations that for transactions  
5 involving a “long gun,” the DES offers only three options in the “gun type” field, namely, “rifle,”  
6 “shotgun” and “rifle/shotgun” (SAC at p. 16, ¶58), which hinders transactions for “firearms with  
7 an undefined subtype” because those firearms do not fit within any of the statutory firearm type  
8 definitions “pistol”/“handgun,” “rifle” or “shotgun” (SAC at p. 2, ¶¶2, 4).

9 Therefore, Petitioners’ request for injunctive relief is moot because, as is established in the  
10 declarations submitted in support of this motion, the DES now has an “Other” option for the “gun  
11 type” field. (Decl. of Cheryl Massaro-Florez at ¶6; Decl. of Maricela Leyva at ¶4; see Joint  
12 Stipulation and Order, filed Nov. 23, 2021, at p. 4, line 24 – p. 5, line 6 [acknowledging  
13 modification of DES].) Notably, Petitioners allege that the addition of an “Other” option would  
14 alleviate the “technological barrier” which is the focus of this case: “This technological barrier  
15 could be alleviated if the DES provided the ‘other’ option for ‘long guns.’” (SAC at p. 17, ¶64.)  
16 Petitioners do not allege any other aspect of the DES that hinders the processing of transactions  
17 for “firearms with an undefined subtype.”

18 Finally, the Court should reject any argument Petitioners make that their claims are not  
19 moot because the DOJ will in the future issue notices or bulletins that improperly restrict the use  
20 of the “Other” option. Petitioners’ contention that a September 27, 2021, bulletin posted by the  
21 DOJ was an attempt to improperly restrict the use of the “Other” option is groundless. (Decl. of  
22 Maricela Leyva, at ¶¶8-9, and Exhs. “A” and “B.”) Furthermore, DOJ’s issuance of notices or  
23 bulletins are beyond the scope of Petitioners’ current claims.

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25       ///

26       ///

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28       ///

## CONCLUSION

The DOJ has modified the DES to address the alleged “technological barrier” upon which Petitioners’ claims are premised. In fact, the DES has been modified in precisely the manner which Petitioners allege would alleviate the “technological barrier.” Accordingly, Petitioners’ claims for writ, declaratory and injunctive relief are moot and should be dismissed by this Court.

Dated: November 29, 2021

Respectfully Submitted,  
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**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 November 29, 2021, I served the attached **NOTICE OF MOTION AND MOTION TO DISMISS THE FIRST, SECOND AND EIGHTH CAUSES OF ACTION IN THE SECOND AMENDED COMPLAINT AND PETITION; MEMORANDUM OF POINTS AND AUTHORITIES** by transmitting a true copy via electronic mail, addressed as follows:

Anna M. Barvir  
Jason A. Davis  
KonstadinosT. Moros  
MICHEL & ASSOCIATES, P.C.  
[abarvir@michellawyers.com](mailto:abarvir@michellawyers.com)  
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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 November 29, 2021, at Los Angeles, California.

---

Jasmine Zarate  
Declarant

---

/s/ Jasmine Zarate  
Signature

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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 COUNTY OF LOS ANGELES

16 CENTRAL DISTRICT

17 **FRANKLIN ARMORY, INC., ET AL.,**

18 Case No. 20STCP01747

19 Plaintiffs and Petitioners,

20 v.

21 **CALIFORNIA DEPARTMENT OF  
JUSTICE ET AL.,,**

22 Defendants and  
23 Respondents.

24 **DECLARATION OF CHERYLE  
MASSARO-FLOREZ IN SUPPORT OF  
MOTION TO DISMISS THE FIRST,  
SECOND AND EIGHTH CAUSES OF  
ACTION IN THE SECOND AMENDED  
COMPLAINT AND PETITION**

25 Date: January 27, 2022  
26 Time: 9:30 a.m.  
27 Dept: 85  
28 Judge: Hon. James C. Chalfant  
Action Filed: May 27, 2020

1 I, Cheryle Massaro-Florez, do hereby declare as follows:

2       1. I am currently employed by the Department of Justice (DOJ), California  
3 Justice Information Services Division, as an Information Technology Supervisor II  
4 in the Application Development Bureau – Firearms Software Development Unit. I  
5 have been employed by the DOJ since 1999. I make this declaration of my own  
6 personal knowledge and will so testify if called.

7       2. In my role as Information Technology Supervisor II, I oversaw a project  
8 undertaken by the Firearms Software Development Unit to modify the Dealer  
9 Record of Sale Entry System (DES) and various DOJ applications and databases.  
10 The scope of the project is described below. The modifications were deployed on  
11 October 1, 2021.

12       3. The DES is a public-facing web application which firearms dealers use to  
13 transmit information to the DOJ to perform background checks on firearms  
14 transactions. The background check is known as the Basic Firearms Eligibility  
15 Check. Dealers enter information into the DES through a Dealer Record of Sale or  
16 “DROS” form, which asks for information about the prospective purchaser or  
17 transferee, the firearm, and the firearms dealer. The information is routed to the  
18 DES database, and is then pulled from that database into an internal database  
19 system known as the Consolidated Firearms Information System. The Consolidated  
20 Firearms Information System coordinates the electronic portion of the Basic  
21 Firearms Eligibility Check by sending inquiries to other electronic databases and  
22 compiling the responses through the DROS application. The DROS application  
23 utilizes a middleware program known as the Consolidated Firearms Interface  
24 Gateway.

25       4. Background checks focus not only on the prospective purchaser but also on  
26 the firearm. For example, the DROS application queries a DOJ database known as  
27 the Automated Firearms System to check if the subject firearm was reported as lost  
28 or stolen. As another example, the DROS application queries the Consolidated

1 Firearms Information System database to determine if the applicant is applying to  
2 purchase more than one “handgun” or “semiautomatic centerfire rifle” in any 30-  
3 day period. As a third example, where the applicant is younger than 21 years old,  
4 the DROS application checks to see that the firearms dealer has submitted  
5 information supporting an exemption to the age requirement.

6 5. Once the Basic Firearms Eligibility Check is completed, and if the firearm  
7 transaction is approved, information is routed from the DES database to several  
8 applications and databases maintained by the DOJ that track firearms and firearm  
9 transactions, including the Automated Firearms System and the Armed and  
10 Prohibited Persons System (APPS). The Automated Firearms System is a  
11 repository of firearm information, which can be queried by law enforcement to  
12 determine who might own a given firearm or what firearms a given person might  
13 have. APPS is a database that cross-references persons with firearms records in the  
14 Automated Firearms System , typically a DROS record, with those who have a  
15 criminal conviction or other circumstance that prohibit them from possessing  
16 firearms.

17 6. The purpose of the project was to include an “other” option in the “gun  
18 type” field in the DES. Prior to the project, when a DES user selected “Long Gun  
19 Transactions” and selected “No” for “Receiver Only,” then the user had to select  
20 one of three options available in the “gun type” field, and those three options were  
21 “RIFLE,” “SHOTGUN” and “RIFLE/SHOTGUN COMBINATION.” As a result  
22 of the project, when a DES user selects “Long Gun Transactions” and selects “No”  
23 for “Receiver Only,” then the user must select one of four options available in the  
24 “gun type” field, and those four options are “RIFLE,” “SHOTGUN” and  
25 “RIFLE/SHOTGUN COMBINATION” and “OTHER.” This modification was  
26 deployed on October 1, 2021.

27 7. As is described above, data flows from the DES database to other databases  
28 and applications and is processed by those other applications. As a result, the

1 project involved modifications not only to the coding of the DES itself, but also to  
2 the coding of several other applications and databases.

3       8. To add the “other” option in the “gun type” menu in the DES, the DES  
4 was enhanced to add the “other” category for four transaction types – sale, buy,  
5 consignment and pawn. In addition, coding was needed to instruct the system to  
6 trigger the Basic Firearms Eligibility Check process for a DROS of a long gun with  
7 the “Gun Type” of “Other.” Coding was also needed to modify the process run in  
8 the DES which checks information submitted in the firearm transaction application,  
9 such as the length of the firearm, to confirm it is consistent with the category  
10 selected for the firearm.

11       9. Because the DES was modified to include an “other” option in the “gun  
12 type” menu, the Consolidated Firearms Interface Gateway, the middleware program  
13 that is used to import and manage data in the Automated Firearms System, had to  
14 be modified to be capable of identifying a firearm as having a gun type of “other,”  
15 and it also had to be modified to allow searches for records of firearms with a gun  
16 type of “other.”

17       10. The Consolidated Firearms Interface Gateway also runs the process that  
18 checks if the firearm which is the subject of a transaction was reported stolen or  
19 lost. Because the DES was modified to include an “other” option in the “gun type”  
20 menu, this process run by the Consolidated Firearms Interface Gateway needed to  
21 be modified to check for firearms with a gun type of “other.”

22       11. The Consolidated Firearms Interface Gateway also runs the process which  
23 checks the Consolidated Firearms Information System database to determine if the  
24 applicant is applying to purchase more than one “handgun” or “semiautomatic  
25 centerfire rifle” in any 30-day period. Because the DES was modified to include an  
26 “other” option in the “gun type” menu, this process run by the Consolidated  
27 Firearms Interface Gateway required enhancement to account for those cases where  
28

1 either the subject of the application at issue or a prior application was a firearm with  
2 a “gun type” of “other.”

3       12. The Consolidated Firearms Interface Gateway also runs the process which  
4 checks the Consolidated Firearms Information System database to determine  
5 whether, for an applicant who is younger than 21-years old, the firearms dealer has  
6 submitted information supporting an exemption to the age requirement. Because the  
7 DES was modified to include an “other” option in the “gun type” menu, this  
8 process had to be enhanced to account for the case where the application was for a  
9 firearm with a “gun type” of “other.”

10      13. Because the DES was modified to include an “other” option in the “gun  
11 type” menu, APPS also required modification to enhance the matching logic which  
12 is used to associate and disassociate firearms from individuals to account for those  
13 cases where the firearm was identified as having a “gun type” of “other.”

14      14. Because the DES was modified to include an “other” option in the “gun  
15 type” menu, which in turn means that firearms could be categorized as “other” in  
16 AFS, an electronic form that citizens can use to retrieve firearms which are being  
17 held by a law enforcement agency needed to be modified to account for the  
18 possibility that the firearm was identified as an “other.” This electronic form is  
19 known as the Law Enforcement Gun Release, and can be accessed through a public  
20 facing website known as the California Firearms Application Reporting System.

21      15. For every individual who has obtained a firearm based on an application  
22 submitted through the DES, there is a “Person Information” record in the  
23 Automated Firearms System. This “Person Information” record is created  
24 automatically, but an individual can modify some information in their “Person  
25 Information” record through the California Firearms Application Reporting System  
26 website by submitting an electronic form known as a Person Information Update.  
27 The electronic Person Information Update form requires the individual to identify a  
28 firearm that is associated with them. Thus, because the DES was modified to

include an “other” option in the “gun type” menu, the electronic Person Information Update form required modification in order to accept a firearm categorized as having a “gun type” of “other.”

16. The California Firearms Application Reporting System website runs a process which checks the Automated Firearms System database to confirm that information associated with a firearm, such as the length of the firearm, is consistent with the category selected for the firearm. Because the DES was modified to include an “other” option in the “gun type” menu, this process had to be enhanced to account for the case where the firearm has a “gun type” of “other.”

17. The Consolidated Firearms Interface Gateway also runs a process which checks the Automated Firearms System database for firearms that are “assault weapons” under California law based on their characteristics. Because the DES was modified to include an “other” option in the “gun type” menu, this process had to be enhanced to account for the case where the firearm has a “gun type” of “other.”

I declare, under penalty of perjury, that the foregoing is true and correct, and that this declaration is executed on November 29, 2021, at Sacramento, California.

Cheryle M. Florez  
Cheryle Massaro-Florez

LA2020601064

**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 November 29, 2021, I served the attached **DECLARATION OF CHERYLE MASSARO-FLOREZ IN SUPPORT OF MOTION 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  
KonstadinosT. Moros  
MICHEL & ASSOCIATES, P.C.  
[abarvir@michellawyers.com](mailto:abarvir@michellawyers.com)  
[Jason@calgunlawyers.com](mailto:Jason@calgunlawyers.com)  
[kmoros@michellawyers.com](mailto:kmoros@michellawyers.com)  
[lpalmerin@michellawyers.com](mailto:lpalmerin@michellawyers.com)

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 November 29, 2021, at Los Angeles, California.

---

Jasmine Zarate

Declarant

---

/s/ Jasmine Zarate

Signature

1 ROB BONTA  
2 Attorney General of California  
3 BENJAMIN BARNOUW  
4 Supervising Deputy Attorney General  
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13 *Attorneys for Defendants and Respondents  
California Department of Justice,  
Attorney General Rob Bonta, and former  
Attorney General Xavier Becerra*

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 COUNTY OF LOS ANGELES

16 CENTRAL DISTRICT

17 **FRANKLIN ARMORY, INC., ET AL.,**

18 Case No. 20STCP01747

19 Plaintiffs and Petitioners,

20 v.

21 **CALIFORNIA DEPARTMENT OF  
22 JUSTICE ET AL.,,**

23 Defendants and  
24 Respondents.

25 **DECLARATION OF MARICELA  
26 LEYVA IN SUPPORT OF MOTION TO  
27 DISMISS THE FIRST, SECOND AND  
28 EIGHTH CAUSES OF ACTION IN THE  
SECOND AMENDED COMPLAINT AND  
PETITION**

29 Date: January 27, 2022  
30 Time: 9:30 a.m.  
31 Dept: 85  
32 Judge: Hon. James C. Chalfant  
33 Trial Date: Not set  
34 Action Filed: May 27, 2020

35 I, Maricela Leyva, do hereby declare as follows:

36 1. I have been employed with the State of California, Department of Justice,  
37 Bureau of Firearms (BOF) Customer Support Center as a Staff Services Manager I  
38 (SSMI) since June 2018. I began working for the BOF in 2012 as a Program  
39 Technician II. I later promoted to Staff Services Analyst, then to Associate

1 Governmental Program Analyst, then to SSMI over Assault Weapon Registration,  
2 and now as a SSMI over the Customer Support Center.

3       2. As an SSMI over the Customer Support Center, it is my responsibility to  
4 manage the daily functions of the Center, which include monitoring calls and  
5 correspondence received by the BOF from firearms dealers, Firearm Safety  
6 Certificate instructors, law enforcement agencies, manufacturers and the public  
7 regarding firearms laws and regulations.

8       3. The Dealer Record of Sale Entry System, often referred to as the “DES,” is  
9 a public-facing web application which firearms dealers use to transmit information  
10 to the BOF to perform background checks on firearms transactions. As a SSMI over  
11 the Customer Support Center, I am familiar with the DES and often deal with  
12 questions posed by firearms dealers regarding the DES.

13       4. The DES was modified, with a deployment date of October 1, 2021, to  
14 include an “other” option in the “gun type” field. Prior to October 1, 2021, when a  
15 DES user selected “Long Gun Transactions” and selected “No” for “Receiver  
16 Only,” then the user was required to select one of three options available in the  
17 “gun type” field, and those three options were “RIFLE,” “SHOTGUN” and  
18 “RIFLE/SHOTGUN COMBINATION.” Beginning on October 1, 2021, when a  
19 DES user selects “Long Gun Transactions” and selects “No” for “Receiver Only,”  
20 then the user must select one of four options available in the “gun type” field, and  
21 those four options are “RIFLE,” “SHOTGUN” and “RIFLE/SHOTGUN  
22 COMBINATION” and “OTHER.”

23       5. In my capacity as the SSMI over the Customer Support Center, I was  
24 involved in the drafting of a Bulletin to be posted on the DES to notify firearms  
25 dealers of the addition of the “other” option in the “gun type” field. The Bulletin  
26 was entitled, “Important Notice Regarding ‘Other’ Firearms,” and was posted on  
27 the DES website on or about September 27, 2021. A true and correct copy of this  
28 Bulletin is attached hereto as Exhibit “A”.

1       6. The primary purpose of this Bulletin was to notify firearms dealers about  
2 the modification of the DES and to instruct them how to utilize the “other” option.

3       7. Another purpose of the Bulletin was to remind firearms dealers that some  
4 firearms that could otherwise be considered to fall into the “other” category fit  
5 within the definition of an “assault weapon” set forth in Penal Code section 30515,  
6 subdivision (a), paragraphs (9), (10), and (11). Transactions involving firearms that  
7 are classified as “assault weapons” under this and other sections of the Penal Code  
8 cannot legally be processed through the DES. Although transactions for firearms  
9 that fit the definition of an “assault weapon” under Penal Code section 30515,  
10 subdivision (a), paragraphs (9), (10), and (11), cannot be legally processed through  
11 the DES, if an individual possessed such a firearm prior to September 1, 2020, and  
12 they satisfied the eligibility criteria set forth in Penal Code section 30950, they  
13 could keep the firearm if they registered it with the Department of Justice before  
14 January 1, 2022. The Bulletin notified firearms dealers that this registration process  
15 would take place between 9:00 a.m. PST on October 1, 2021, through 11:59 p.m.  
16 PST on December 31, 2021. The Bulletin referenced Penal Code section 30900 to  
17 inform dealers that there was a separate registration process for “other” assault  
18 weapons, so that they would not mistakenly attempt to register an “assault weapon”  
19 through the DES.

20       8. To achieve the purpose of reminding firearms dealers that some firearms  
21 that could otherwise be considered to fall into the “other” category fit within the  
22 definition of an “assault weapon” set forth in Penal Code section 30515,  
23 subdivision (a), paragraphs (9), (10), and (11), the Bulletin quoted those paragraphs  
24 in full. All three paragraphs apply to a “semiautomatic centerfire firearm that is not  
25 a rifle, pistol, or shotgun,” that has specified features. The feature in paragraph (10)  
26 is that the firearm “has a fixed magazine with the capacity to accept more than 10  
27 rounds.” The feature in paragraph (11) is that the firearm “has an overall length of  
28 less than 30 inches.” To highlight these two paragraphs, the Bulletin included the

1 following note: “Note: Prior to the sale, loan, or transfer of an ‘Other’ type firearm  
2 you must confirm: 1. That it has a fixed magazine that accepts 10 rounds or fewer.  
3 2. That it has an overall length of 30 inches or more.” Unfortunately, this language  
4 was imprecise because it inadvertently failed to specify that these limitations only  
5 apply to “semiautomatic centerfire firearms.”

6 9. When this omission was brought to BOF’s attention, BOF issued a revised  
7 Bulletin on September 30, 2021. A true and correct copy of the revised Bulletin,  
8 posted on September 30, 2021, is attached hereto as Exhibit “B”. The Bulletin was  
9 titled “IMPORTANT NOTICE Regarding the Sale of ‘Other’ Firearms,” and  
10 specified that it superseded the original Bulletin posted on September 27, 2021.  
11 This revised Bulletin corrected the imprecision of the original Bulletin by clarifying  
12 that an “other” firearm could fit the definition of an assault weapon under Penal  
13 Code section 30515, subdivision (a), paragraphs (9), (10), and (11), only if it was  
14 “centerfire” firearm. Specifically, in place of the imprecise note from the original  
15 Bulletin, the revised Bulletin included the following: “Note: Prior to the sale, loan,  
16 or transfer of a centerfire ‘Other’ type firearm, you must confirm the ‘Other’ does  
17 not meet the criteria of an ‘Other’ Assault Weapon pursuant to Penal Code 30515.”  
18 As with the first Bulletin, the revised Bulletin posted on September 30, 2021, also  
19 quoted Penal Code section 30515, subdivision (a), paragraphs (9), (10), and (11).  
20 The intent of the revised Bulletin was the same as the intent of the original Bulletin.

21 I declare, under penalty of perjury, that the foregoing is true and correct, and  
22 that this declaration is executed on November 24, 2021, at Sacramento, California.

23  
24 Maricela Leyva  
25 Maricela Leyva  
26  
27  
28

LA2020601064  
35686621

**Exhibit A**  
**Notice**  
**Regarding the Sale of "Other" Firearms**

**IMPORTANT NOTICE**  
**Regarding the Sale of “Other” Firearms**

The purpose of this notice is to provide information on firearms categorized as firearm type "Other" and to advise California Firearm Dealers (CFD's) how to submit a Dealer Record of Sale (DROS) transaction in the DROS Entry System (DES) for an "Other" type firearm. The gun type option, "Other" will be available within the DES at 5:00 am Friday, October 1, 2021.

**WHAT IS CONSIDERED AN “OTHER” FIREARM**

An "Other" type firearm is a firearm that does not meet the definition of a rifle (Pen. Code, § 17090), shotgun (Pen. Code, § 17190), or pistol (Pen. Code, § 16350.) An "Other" can also be considered an assault weapon.

Note: Prior to the sale, loan, or transfer of an "Other" type firearm you must confirm:

1. That it has a fixed magazine that accepts 10 rounds or fewer.
2. That it has an overall length of 30 inches or more.

If the "Other" does not meet the criteria above or is considered an "Other" Assault Weapon pursuant to Penal Code 30900, **the “Other” may not be sold, loaned or transferred** in the DES.

**WHAT IS CONSIDERED AN “OTHER” ASSAULT WEAPON**

Pursuant to Penal Code section 30900, subdivision (c), paragraph (1), effective September 1, 2020, an "Other" assault weapon is defined in Penal Code section 30515, subdivision (a), paragraphs (9), (10), or (11), as:

9. A semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that does not have a fixed magazine, but that has any one of the following:
  - A. A pistol grip that protrudes conspicuously beneath the action of the weapon.
  - B. A thumbhole stock.
  - C. A folding or telescoping stock.
  - D. A grenade launcher or flare launcher.
  - E. A flash suppressor.
  - F. A forward pistol grip.
  - G. A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.
  - H. A second handgrip.
  - I. A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning the bearer's hand, except a slide that encloses the barrel.
  - J. The capacity to accept a detachable magazine at some location outside of the pistol grip.
10. A semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that has a fixed magazine with the capacity to accept more than 10 rounds.
11. A semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that has an overall length of less than 30 inches.

For purposes of this section, "fixed magazine" means an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.

**IMPORTANT NOTICE**  
**Regarding the Sale of “Other” Firearms**

Penal Code section 30900, as amended, requires any person who, prior to September 1, 2020, lawfully possessed an assault weapon as defined by Penal Code Section 30515 subdivision (a) paragraphs (9), (10), and (11), and is eligible to register an assault weapon as set forth in Penal Code Section 30900, subdivision (c), to submit an application to the DOJ to register the firearm **before January 1, 2022**.

**The “Other” Assault Weapon Registration will take place between 9:00 a.m. PST on October 1, 2021 through 11:59 p.m. PST on December 31, 2021.**

**RESTRICTIONS THAT DO NOT APPLY TO THE SALE OF NON-ASSAULT WEAPON  
“OTHER” FIREARMS**

**30-DAY RESTRICTION**

Penal Code section 27535, subdivision (a), provides in pertinent part that “A person shall not make an application to purchase more than one handgun or semiautomatic centerfire rifle within any 30-day period. This restriction does **NOT** apply to “Other” type firearms.

**AGE RESTRICTION**

Penal Code section 27510, subdivision (a), provides “A person licensed under sections 26700 to 26915, inclusive, shall not sell, supply, deliver, or give possession or control of a firearm to any person who is under 21 years of age. This restriction does **NOT** apply to a fully assembled “Other” type firearm.

Under federal law, an “Other” frame or receiver may not be sold, loaned or transferred to an individual less than 21 years of age. [18 U.S.C. 921(a)(5) and (7) and 922(b)(1); 27 CFR 478.11 and 478.99(b)]

**SALE OR TRANSFER OF SELF-MANUFACTURED “OTHER” FIREARMS PROHIBITED**

The sale or transfer of ownership of a firearm manufactured or assembled pursuant to Penal Code section 29180, subdivision (d)(1) is prohibited. This includes “Other” type firearms. The serial number on this particular firearm contains the abbreviation “FMBUS” (Firearm Manufactured by Unlicensed Subject) and additional numbers and letters.



**IMPORTANT NOTICE**  
**Regarding the Sale of “Other” Firearms**

**HOW TO SUBMIT AN “OTHER” FIREARM IN THE DES**

The DROS Entry System (DES) **Gun Type** field, for long gun transactions only, has been enhanced with an “Other” firearm option. Below are instructions on how to submit an “Other” type firearm.

**STEP 1**

Select the **Long Gun Transactions** type related to the sale you are conducting.

Long Gun Transactions

- Dealer Long Gun Sale
- Private Party Long Gun Transfer
- Pawn/Consignment Long Gun Redemption
- Curio/Relic Long Gun Sale
- Long Gun Loan

**STEP 2**

Under the Transaction and Firearm Information, **Gun Type** drop down, select “Other”.

Transaction and Firearm Information

*Gun Show Transaction	Waiting Period Exemption		
Select	Select Waiting Period Exemption		
30-Day Restriction Exemption			
Select 30-Day Restriction Exemption			
*Receiver Only	*Make	*Model	
Select	Select Make Description		
*Caliber	Additional Caliber		
Select Caliber	Select Additional Caliber		
Additional Caliber	Additional Caliber		
Select Additional Caliber	Select Additional Caliber		
*Barrel Length	*Unit	*Gun Type	*Category
	Select Unit	Select Gun Type	Select Category
Select Gun Type		Select Gun Type	
RIFLE		Select Gun Type	
RIFLE/SHOTGUN COMBINATION		Select Gun Type	
SHOTGUN		Select Gun Type	
OTHER		Select Gun Type	
*Serial Number	*Re-enter	*Color	
		Select Color	
*New/Used Gun	*Firearm Safety	Comments	
Select	Select Firearm Safety Device (FSD)	Comments	
200 character limit. Characters remaining: 200			

**STEP 3**

Follow the steps identified in the DES Firearms and Ammunition Dealer User Guide titled, “Previewing, Printing, and Submitting/Delivering Firearm DROS Transaction” to complete and submit the transaction.

**IMPORTANT NOTICE**  
**Regarding the Sale of “Other” Firearms**

**CALIFORNIA FIREARMS LICENSEE CHECK SYSTEM**

When completing the firearms shipment verification request, an “Other” type firearm should be documented as a “long gun” in the number of weapons to be shipped field.



The screenshot shows the California State of California Department of Justice website. The top navigation bar includes links for AG HOME PAGE, VERSION 2.0.0.9, HELP, CONTACT US, and LOGOFF. The user is identified as 'User: JAMES HEWITT | January 27, 2020'. The main page title is 'Firearms Shipment Verification Request'. The form fields include 'Shipment Recipient CL Number' (with a 'View CL Number Information' link), 'Number of weapons to be shipped' (with 'Handguns' and 'Long Guns' options, where 'Long Guns' is highlighted with a red box and a red arrow), and 'Shipment Invoice Number'. Below the form are 'Submit', 'Clear', and 'Main Menu' buttons.

**WHERE CAN I FIND ADDITIONAL INFORMATION ABOUT “OTHER” ASSAULT WEAPONS?**

Additional information can be found within the [“Other” Assault Weapons Frequently Asked Questions](#) on the Bureau of Firearms website at <https://oag.ca.gov/firearms/regagunfaqs>.

If you have any questions, please contact the Bureau of Firearms, Customer Support Center at (855) 365-3767 or via e-mail at [bofdes@doj.ca.gov](mailto:bofdes@doj.ca.gov) Monday through Saturday 8:00 am to 9:00 pm and Sunday 8:00 am to 4:30 pm. You may also seek guidance with interpretation of this law from your legal counsel.

## **Exhibit B**

Notice  
Regarding the Sale of "Other" Firearms  
(Supersedes Des Bullietin Exhibit A)

**IMPORTANT NOTICE  
Regarding the Sale of “Other” Firearms**

**(THIS BULLETIN SUPERSEDES DES BULLETIN TITLED “Important Notice Regarding ‘Other’ Firearms” – Posted on 09/27/2021 at 9:50 AM.)**

The purpose of this notice is to provide information on firearms categorized as firearm type “Other” and to advise California Firearm Dealers (CFD’s) how to submit a Dealer Record of Sale (DROS) transaction in the DROS Entry System (DES) for an “Other” type firearm. The gun type option, “Other” will be available within the DES at 5:00 am Friday, October 1, 2021.

**WHAT IS CONSIDERED AN “OTHER” FIREARM**

An “Other” type firearm is a firearm that does not meet the definition of a rifle (Pen. Code, § 17090), shotgun (Pen. Code, § 17190), or pistol (Pen. Code, § 16350.) Firearms that might be eligible for DROS at this time would include serialized receivers, barreled actions (that lack a stock), “Buntline” type firearms with revolving cylinders, firearms that fire shotgun shells that also lack a stock (commonly known as Pistol Grip shotguns).

Note: Prior to the sale, loan, or transfer of a centerfire “Other” type firearm, you must confirm the “Other” does not meet the criteria of an “Other” Assault Weapon pursuant to Penal Code 30515.

**WHAT IS CONSIDERED AN “OTHER” ASSAULT WEAPON**

Effective September 1, 2020, an “Other” assault weapon is defined in Penal Code section 30515(a)(9), (10), or (11), as:

9. A semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that does not have a fixed magazine, but that has any one of the following:
  - A. A pistol grip that protrudes conspicuously beneath the action of the weapon.
  - B. A thumbhole stock.
  - C. A folding or telescoping stock.
  - D. A grenade launcher or flare launcher.
  - E. A flash suppressor.
  - F. A forward pistol grip.
  - G. A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.
  - H. A second handgrip.
  - I. A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning the bearer’s hand, except a slide that encloses the barrel.
  - J. The capacity to accept a detachable magazine at some location outside of the pistol grip.
10. A semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that has a fixed magazine with the capacity to accept more than 10 rounds.
11. A semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that has an overall length of less than 30 inches.

For purposes of this section, “fixed magazine” means an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.

See related Other Assault Weapon Regulations: <https://oag.ca.gov/firearms/regs/oaw>.

Penal Code section 30900, as amended, requires any person who, prior to September 1, 2020, lawfully possessed an assault weapon as defined by Penal Code Section 30515 subdivision (a) paragraphs (9),

**IMPORTANT NOTICE**  
**Regarding the Sale of “Other” Firearms**

(10), and (11), and is eligible to register an assault weapon as set forth in Penal Code Section 30900, subdivision (c), to submit an application to the DOJ to register the firearm **before January 1, 2022.**

**The “Other” Assault Weapon Registration will take place between 9:00 a.m. PST on October 1, 2021 through 11:59 p.m. PST on December 31, 2021.**

**RESTRICTIONS REGARDING THE SALE OF NON-ASSAULT WEAPON “OTHER” FIREARMS**

**30-DAY RESTRICTION**

Penal Code section 27535, subdivision (a), provides in pertinent part that “A person shall not make an application to purchase more than one handgun or semiautomatic centerfire rifle within any 30-day period.” This restriction does **NOT** apply to “Other” type firearms.

**AGE RESTRICTION**

Penal Code section 27510, subdivision (a), provides “A person licensed under sections 26700 to 26915, inclusive, shall not sell, supply, deliver, or give possession or control of a firearm to any person who is under 21 years of age.” This restriction applies to a fully assembled “Other” firearm unless the purchaser is exempt under 27510, subdivision (b).

Under federal law, an “Other” frame or receiver may not be sold, loaned or transferred to an individual less than 21 years of age. [18 U.S.C. 921(a)(5) and (7) and 922(b)(1); 27 CFR 478.11 and 478.99(b)]

**SALE OR TRANSFER OF SELF-MANUFACTURED “OTHER” FIREARMS PROHIBITED**

The sale or transfer of ownership of a firearm manufactured or assembled pursuant to Penal Code section 29180, subdivision (d)(1) is prohibited. This includes “Other” type firearms. The serial number on this particular firearm contains the abbreviation “FMBUS” (Firearm Manufactured by Unlicensed Subject) and additional numbers and letters.



**HOW TO SUBMIT AN “OTHER” FIREARM IN THE DES**

The DROS Entry System (DES) **Gun Type** field, for long gun transactions only, has been enhanced with an “Other” firearm option. Below are instructions on how to submit an “Other” type firearm.

**IMPORTANT NOTICE**  
**Regarding the Sale of “Other” Firearms**

**STEP 1**

Select the **Long Gun Transactions** type related to the sale you are conducting.

Long Gun Transactions

- Dealer Long Gun Sale
- Private Party Long Gun Transfer
- Pawn/Consignment Long Gun Redemption
- Curio/Relic Long Gun Sale
- Long Gun Loan

**STEP 2**

Under the Transaction and Firearm Information, **Gun Type** drop down, select “Other”.

Transaction and Firearm Information

*Gun Show Transaction?	Waiting Period Exemption		
Select	Select Waiting Period Exemption		
30-Day Restriction Exemption			
Select 30-Day Restriction Exemption			
*Receiver Only	*Make	*Model	
Select	Select Make Description		
*Caliber	Additional Caliber		
Select Caliber	Select Additional Caliber		
Additional Caliber	Additional Caliber		
Select Additional Caliber	Select Additional Caliber		
*Barrel Length	*Unit	*Gun Type	*Category
	Select Unit	Select Gun Type	Select Category
Serial Number	*Re-enter	RIFLE	
		RIFLE/SHOTGUN COMBINATION	
		SHOTGUN	
*New/Used Gun	*Firearm Safety	OTHER	*Color
Select	Select Firearm Safety Device (FSD)	Select Age Exemption	Select Color
Comments			
200 character limit. Characters remaining: 200			

**STEP 3**

Follow the steps identified in the DES Firearms and Ammunition Dealer User Guide titled, “Previewing, Printing, and Submitting/Delivering Firearm DROS Transaction” to complete and submit the transaction.

**CALIFORNIA FIREARMS LICENSEE CHECK SYSTEM**

When completing the firearms shipment verification request, an “Other” type firearm should be documented as a “long gun” in the number of weapons to be shipped field.

State of California  Office of the Attorney General [SKIP TO CONTENT](#)

Department of Justice [AG HOME PAGE](#) [VERSION 2.0.0.9](#) [HELP](#) [CONTACT US](#) [LOGOFF](#) User: JAMES HEWITT | January 27, 2020

**Firearms Shipment Verification Request**

*Shipment Recipient CL Number	<input type="text"/>	<a href="#">View CL Number information</a>
You must obtain the five (5) digit CL number from the intended recipient of the firearms shipment.		
*Number of weapons to be shipped		
Handguns	Long Guns	<input type="text"/>
*Shipment Invoice Number		
<input type="button" value="Submit"/> <input type="button" value="Clear"/> <input type="button" value="Main Menu"/>		

**IMPORTANT NOTICE**  
**Regarding the Sale of “Other” Firearms**

**WHERE CAN I FIND ADDITIONAL INFORMATION ABOUT “OTHER” ASSAULT WEAPONS?**

Additional information can be found on the Bureau of Firearms website within the [“Other” Assault Weapon Registration](#) web page at <https://oag.ca.gov/firearms/oawr-notice> or within the [“Other” Assault Weapons](#) Frequently Asked Questions web page at <https://oag.ca.gov/firearms/regagunfaqs>.

If you have any questions, please contact the Bureau of Firearms, Customer Support Center at (855) 365-3767 or via e-mail at [bofdes@doj.ca.gov](mailto:bofdes@doj.ca.gov) Monday through Saturday 8:00 am to 9:00 pm and Sunday 8:00 am to 4:30 pm. You may also seek guidance with interpretation of this law from your legal counsel.

**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 November 16, 2021, I served the attached **DECLARATION OF MARICELA LEYVA IN SUPPORT OF MOTION 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.  
[abarvir@michellawyers.com](mailto:abarvir@michellawyers.com)  
[Jason@calgunlawyers.com](mailto:Jason@calgunlawyers.com)  
[kmoros@michellawyers.com](mailto:kmoros@michellawyers.com)  
[lpalmerin@michellawyers.com](mailto:lpalmerin@michellawyers.com)

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 November 16, 2021, at Los Angeles, California.

---

Jasmine Zarate  
Declarant

---

/s/ Jasmine Zarate  
Signature

## PROOF OF SERVICE

Case Name: *Franklin Armory, Inc., et al. v. California Department of Justice, et al.*  
Court of Appeal Case No. B340913  
Superior Court Case No. 20STCP01747

I, Laura Fera, 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, Long Beach, California 90802.

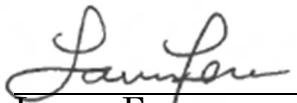
On May 21, 2025, I served a copy of the foregoing document described as: **APPELLANTS' APPENDIX, VOLUME III OF XX, Pages 216-354**, on the following parties, as follows:

Kenneth G. Lake  
[Kenneth.Lake@doj.ca.gov](mailto:Kenneth.Lake@doj.ca.gov)  
Andrew F. Adams  
[Andrew.Adams@doj.ca.gov](mailto:Andrew.Adams@doj.ca.gov)  
Office of the Attorney General  
300 South Spring Street  
Los Angeles, CA 90013

*Attorneys for Respondent*

These parties were served as follows: I served a true and correct copy by electronic transmission through TrueFiling. Said transmission was reported and completed without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 21, 2025, at Long Beach, California.



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Laura Fera  
Declarant