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**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SAN DIEGO**

MAURO CAMPOS; SKYLER CALLAHAN-MILLER; FIVE FIVE SIX INC., dba FIREARMS UNKNOWN; DIMITRIOS KARRAS; PWGG L.P., dba POWAY WEAPONS & GEAR & PWG RANGE; JOHN PHILLIPS; SAN DIEGO GUN OWNERS PAC; CALIFORNIA GUN RIGHTS FOUNDATION; SECOND AMENDMENT FOUNDATION; FIREARMS POLICY FOUNDATION; and FIREARMS POLICY COALITION, INC.,

Petitioners and Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of California; BRENT E. ORICK, in his official capacity as Director of the California Department of Justice Bureau of Firearms; and CALIFORNIA DEPARTMENT OF JUSTICE,

Respondents and Defendants.

Case No.: 37-2020-00030178-CU-MC-CTL

**REPLY MEMORANDUM IN SUPPORT OF PETITIONERS AND PLAINTIFFS' VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF**

Date: July 22, 2022
Time: 1:30 p.m.
Department: 64

Hon. John S. Meyer

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## REPLY MEMORANDUM

### 1. The Case Is Not Moot: DOJ Continues To Defend Its Interpretation Of Penal Code § 28220 And Its Authority To Violate The Waiting Period Laws.

DOJ's lead opposition argument is that this case is moot because there are no current delays in processing firearm transactions. Opp. at 16:5–23. But the fact that there are no delays right now does not moot this controversy. The fundamental issue in the case – DOJ's authority to delay firearms beyond the 10-day waiting period – remains live. The challenged policy remains in effect and is posted on DOJ's Bureau of Firearms website. Indeed, DOJ spends several pages of its opposition defending its interpretation of the statutory scheme on the merits. Opp. at 20–29 (arguing at length that "The Defendants Complied With California's Statutory Scheme"). The issues have been sharply presented and resolution of this case will vindicate Plaintiffs' rights and remedy DOJ's unlawful conduct by providing clear guidance on its statutory duties administering the background check.

The Court's analysis of mootness is guided by the same considerations when addressing either the writ of mandate or the claim for declaratory relief. "Although writs of mandate and judicial declarations are different types of relief with different requirements, they both require an actual controversy and they both contain a mootness exception for issues of public importance that are likely to recur." *Roger v. Cty. of Riverside*, 44 Cal.App.5th 510, 529 (2020). "The pivotal question in determining if a case is moot is . . . whether the court can grant the plaintiff any effectual relief." *Cuenca v. Cohen*, 8 Cal.App.5th 200, 217 (2017). And where a governmental entity adopts and enforces a policy or interpretation of law, a challenge to that policy or practice remains ripe where a court "does not have to guess" how that policy would be applied in a particular case and there is a "reasonable expectation" that the challenged practice will be repeated in the future. *Communities for a Better Env't v. State Energy Res. Conservation & Dev. Comm'n*, 19 Cal.App.5th 725, 736–38 (2017).

The court's decision in *Env't Def. Project of Sierra Cty. v. Cty. of Sierra*, 158 Cal.App.4th 877 (2008) is instructive. In that case, the plaintiff brought various claims arising out of a county's consideration of a developer's application for approval of a tentative map. After the county

approved the map, the plaintiff dismissed its mandamus claims but pressed on with its claim seeking a declaration that the county violated the Government Code by failing to provide adequate notice of the board of supervisors' hearing. The appellate court held that the controversy remained live despite the fact that the specific project spurring the lawsuit was no longer at issue. *Id.* at 884–88. Specifically, the dispute remained ripe because "[t]here was and is an 'actual controversy' between the parties as to whether" the county's zoning practice violated state law "given their different interpretations of the Government Code." *Id.* 886. This conclusion was cemented because the county "made clear that it [would] continue" the practice "in the future." *Id.*

The same is true here. There is an ongoing dispute over the lawfulness of DOJ's practice of delaying firearm transfers "given [the parties'] different interpretations of" state law, and DOJ's position in this case confirms that it will continue to follow the challenged practice in the future. *See Cal. All. for Util. etc. Educ. v. City of San Diego*, 56 Cal.App.4th 1024, 1030 (1997) (courts may presume a challenged practice will continue in the future when a public agency fails to concede its actions were unlawful).

Even if these authorities were not dispositive of the mootness issue, the dispute would remain justiciable because it "involves a matter of continuing public interest" and the dispute "is likely to recur." *Californians for Fair Representation—No on 77 v. Super. Ct.*, 138 Cal.App.4th 15, 22 (2006). On that score, California courts have routinely rejected mootness arguments when considering the authority of statewide officials that raise questions of broad public interest where judicial resolution can set future controversies to rest. *See, e.g.*, *White v. Davis*, 30 Cal.4th 528, 563 (2003) (despite issue being moot, the Supreme Court reached the merits of dispute over the State Controller's authority, concluding that "it is appropriate to address the state employee salary issue that has been briefed in this court, in order to provide guidance to the State Controller and other public officials in the event of a future budget impasse"); *Gilb v. Chiang*, 186 Cal.App.4th 444, 460 (2010) (applying public interest exception to mootness where State Controller had "made it clear" that he would pursue the same course of conduct in a future controversy); *Steinberg v. Chiang*, 223 Cal.App.4th 338, 343 (2014) (rejecting mootness argument where the court did "not need to guess at any additional facts" to resolve the case and State Controller "continu[ed] to

litigate his authority" under state law); *Newsom v. Super. Ct.*, 63 Cal.App.5th 1099, 1111 (2021) (rejecting mootness argument and considering declaratory relief action challenging scope of gubernatorial authority during an emergency because "the COVID-19 crisis is not over and the efforts to combat it are of statewide concern").

To support its mootness argument, DOJ claims that Plaintiffs have failed to show that it was DOJ's policy to delay firearm transfers "in its typical administrative practice," but rather that it was "only a temporary practice utilized under several operational difficulties that are unlikely to recur." Opp. at 19:17–22. This obscures the critical issue: DOJ enacted a "practice" based on an asserted statutory authority to delay firearm transfers, and it continues to defend the legality of that practice to this day. Perhaps DOJ's mootness argument would have more force if an earthquake or computer hacking made it literally impossible to conduct background checks based on damage to the DROS computer database. But that is not what happened here. DOJ asserted a never-before-claimed statutory authority to implement a practice of delaying firearm transactions beyond the 10-day waiting period (up to 30 days), whereby it would start leaving DROS transactions in a "Pending" status after the expiration of the 10-day waiting period to prevent dealers from transferring firearms to lawful purchasers. That practice caused widespread and significant delays stretching across several months and impacting over 200,000 firearm transactions. And the announcement of the authority for this supposedly "temporary practice" remains in effect to this day. It is therefore disingenuous to claim that resolving this case will not "provide any meaningful guidance" to DOJ, Opp. at 18:13–21, when in fact the relief Plaintiffs seek would put this controversy to rest by confirming that DOJ lacks authority to delay firearm transactions except in the limited and expressly enumerated circumstances set forth in Section 28220(f).

This case is thus distinguishable from *BKHN, Inc. v. Dep't of Health Servs.*, 3 Cal.App.4th 301, 309 (1992), which DOJ relies on to support its claim that this case "lacks urgency" and "definiteness." Opp. at 19: 14–25. In *BKHN*, the plaintiff sought wide-ranging pre-enforcement review of an environmental remediation demand, which the Court held "lack[ed] . . . urgency and definiteness" because it "would have to imagine a myriad of hypotheticals" and then "speculate on the application of [state law] to those hypotheticals." 3 Cal.App.4th at 309–10. Accordingly, the

court "decline[d] . . . to enter into such a contrived inquiry." *Id.* at 310 (quoting *Pacific Legal Found. v. Cal. Coastal Comm'n*, 33 Cal.3d 158, 172 (1982)). *Pacific Legal* – the source of *BKHN*'s "urgency" and "definiteness" language – is to the same effect. 33 Cal.3d at 172 (noting that "the abstract posture of the case" would require the court to "speculate" on "hypothetical" scenarios). Here, of course, the Court does not have to guess how this dispute would apply to a particular set of facts: No further or additional factual development is necessary. *Cf. Hayward Area Planning Ass'n, Inc. v. Alameda Cty. Transp. Auth.*, 72 Cal.App.4th 95, 103 (1999) ("Resolution of this issue requires an interpretation of the Act, upon which the facts in this case will have little bearing."); *Sec. Nat'l Guar., Inc. v. Cal. Coastal Comm'n*, 159 Cal.App.4th 402, 418 (2008) (a "purely legal" challenge to an agency's statutory authority is "presumptively reviewable").

This case raises fundamentally *legal* questions, which distinguishes it from *MHC Operating Ltd. P'ship v. City of San Jose*, 106 Cal.App.4th 204 (2003), where the court declined to exercise its discretion to reach a moot appeal under the public-interest exception because the issues there were "essentially factual in nature and therefore require resolution on a case-by-case basis," and "the fact-driven nature of the questions presented" made them unsuitable for review. *Id.* at 215. That consideration is not present here.

*Brach v. Newsom*, which DOJ cites, provides a useful counterexample. In that case, a group of parents brought a constitutional challenge to the aspects of California's Covid-19 "Reopening Framework" and related executive orders that restricted public schools' ability to reopen for in-person instruction. --- F.4th ----, 2022 WL 2145391, *2–3 (9th Cir. June 15, 2022). By the time the dispute reached the Ninth Circuit, however, Governor Newsom "ha[d] rescinded the challenged executive orders" and "revoked" the reopening framework, such that "there [was] no longer any state order for the court to declare unconstitutional or to enjoin." *Id.* at *4. Accordingly, the court held that "[i]t could not be clearer that this case is moot." *Id.* (citing *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013), for the proposition that "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the

plaintiffs' particular legal rights.'"). Yet here DOJ's policy remains in effect and there is a live controversy about the parties' legal rights – DOJ has not revoked or rescinded its asserted authority to delay firearm transactions.

On that score, a writ would not be "futile" or directed at "abstract rights" as DOJ claims. Opp. at 28:15–17. A writ of mandate directing DOJ to cease its policy and practice of delaying firearms beyond the 10-day waiting period enforces the statutory scheme and protects the rights of Plaintiffs (including the members of the plaintiff firearms advocacy organizations) by ensuring DOJ's compliance with the waiting period laws in the future. Accordingly, a writ would not be "futile," which the case law equates to relief that is "useless, unenforceable, or unavailing," *Cty. of San Diego v. State of Cal.*, 164 Cal.App.4th 580, 595–96 (2008), or of "no practical benefit" to a petitioner. *Associated Students of N. Peralta Cmty. Coll. v. Bd. of Trustees*, 92 Cal.App.3d 672, 680 (1979). On the latter point, this squarely falls within the well-recognized exception to the "general rule" against a writ issuing "to enforce an abstract right," which "bends . . . when the case presents an 'important question affecting the public interest that is capable of repetition yet likely to evade review.'" *Gardner v. Super. Ct.*, 185 Cal.App.4th 1003, 1008–09 (2010) (cleaned up) (electing to decide merits of technically moot challenge to superior court policy because the court continued to follow and defend its policy).

To a similar end, Plaintiffs have not asked the Court to resolve a dispute that is "conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court." Opp. at 18:27–19:2 (quoting *Wilson & Wilson v. City Council of Redwood City*, 191 Cal.App.4th 1559, 1582 (2011)). In *Wilson*, the plaintiff sought declaratory relief concerning a city's authority to acquire his property by eminent domain; the court held that this issue was not ripe because "[t]he City ha[d] taken no steps to acquire [the plaintiff's] property, and, indeed, it may never do so." *Id.* at 1584. There is nothing conjectural about the posture of this case where DOJ's policy in fact delayed over 200,000 firearm transactions.

Finally, DOJ claims that these same mootness concerns render the case unsuitable for declaratory relief. Not so. "An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a

public entity has engaged in conduct or established policies in violation of applicable law." *City of Cotati v. Cashman*, 29 Cal.4th 69, 79 (2002) (quoting *Alameda Cty. Land Use Ass'n v. City of Hayward*, 38 Cal.App.4th 1716, 1723 (1995)). That is precisely what Plaintiffs have done: They have a "fundamental disagreement" over DOJ's conduct and policies that violate applicable law. Under these circumstances, the court lacks discretion to refuse consideration of the declaratory relief claim. "Where a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction." *Meyer v. Sprint Spectrum L.P.*, 45 Cal.4th 634, 647 (2009).

In short, the case is not moot. The Court should resolve the competing claims on the merits.

**2. DOJ's Policy And Practice Of Delaying Firearm Transactions Defies State Law.**

DOJ makes two principal arguments to claim that it complied with California's background check laws. First, the agency argues that it did not have a "policy" of delaying background checks, claiming that the notice on the website "is an accurate statement of the law." Opp. at 21–22. And second, to further this argument, DOJ defends its claim – as stated in its published policy – by stating that the "Legislature gave the Department up to 30 days to complete background checks where it was unable to determine eligibility in a shorter period." Opp. at 22:9–10.

But this demonstrates Plaintiffs' point in bringing this lawsuit: DOJ has a policy, based on its incorrect interpretation of California law, that it has general authority to take "up to 30 days" to conduct a background check, and this policy was confirmed by its practice of delaying over 200,000 firearm transactions beyond the 10-day period without complying with Section 28220(f). As Plaintiffs have demonstrated, this practice violates the laws and regulations governing background checks:

*First*, California law specifies the conditions allowing DOJ to delay a firearm transfer or restrict delivery of a firearm beyond the 10-day period after the DROS application is submitted – none of which apply here. Under Section 28220(f), DOJ may delay delivery of a firearm beyond the 10-day waiting period only if a background check conducted within the initial 10-day window affirmatively shows that the purchaser might be prohibited from possessing a firearm – based on

their mental health record, their criminal record, or because they have already purchased a handgun in the previous 30 days – and DOJ is therefore "unable to ascertain" whether the purchaser is actually prohibited or ineligible. *See* Writ Br. at 4:12–5:14.

*Second*, DOJ's own regulations provide that the DROS DES transaction records are set to "Pending" "when the purchaser's eligibility is under review during the 10-day waiting period, and a "Delayed" status applies "when the Department is unable to determine the purchaser's eligibility within the 10-day waiting period." 11 CCR § 4230(b)(2)(A), (B). Thus, there is no lawful basis for DOJ to leave an individual in a "Pending" status after the expiration of the 10-day waiting period and prevent licensed dealers from transferring a firearm unless DOJ determines, after performing the background check within the first 10 days, that it is unable to determine whether a proposed purchaser or transferee is prohibited or ineligible based on specific, identifiable information that meets one of the statutorily defined circumstances. *See* Writ Br. at 5:15–6:8.

*Third*, DOJ asserted statutory authority to delay firearm transactions "up to 30 days" even where DOJ did not "delay" a transaction based on affirmative evidence in the 10-day period that a purchaser may be prohibited or ineligible as required by Section 28220(f). And DOJ relied on that erroneous interpretation of its authority to delay over 200,000 background checks beyond the 10-day period. *See* Writ Br. at 6:22–8:18.

DOJ's adoption and application of a policy that defies both Penal Code section 28220 and Section 4230 was unlawful. The agency lacks authority to defy state law and its own regulations. The agency cannot "substitute its judgment" for the Legislature's by "administratively rewrit[ing]" a statute. *Plan. & Conservation League v. Dep't of Fish & Game*, 54 Cal.App.4th 140, 490 (1997). And DOJ likewise cannot "under the guise of a rule . . . vary or enlarge the terms of" a statute, even when adopting a policy that lacks the formality of a regulation. *Agnew v. State Bd. of Equalization*, 21 Cal.4th 310, 321 (1999).

The opposition barely takes issues with these basic concepts. The closest it comes is arguing that "Petitioner can point to no directive from the Legislature that a background check should cease 10 days after the Department receives the application, even where the Department has not been able to perform the required database checks," and that "the Legislature gave the

Department up to 30 days to complete background checks where it was unable to determine eligibility in a shorter period." Opp. at 22:6-10. But this ignores Plaintiffs' showing that the Legislature expressly limited, in Section 28220(f), the Department's legal authority to delay to those circumstances where the "inability" to determine eligibility resulted from uncertainty after an *affirmative search* – not when DOJ staff never *started* the search because of the press of business.

It likewise asserts that Section 28220 "places no explicit deadline for the Department to conduct the review that it describes in subdivision (a)." Opp. at 25:13–14. The statutory and regulatory scheme governing background checks explicitly and consistently contemplate that DOJ's review is tied to a ten-day waiting period. Penal Code §§ 26815(a) & 27540(a) (setting forth 10-day limitation on delivery of firearm); 28220(d), (e), (f)(1)(A)(i)–(iii), (f)(1)(B)(3) (cross-referencing "the waiting period described in Sections 26815 and 27540"); 11 CCR § 4230(b)(1)(A), (b)(2)(A), (b)(2)(B) (all referring to the DOJ's work in relation to "the 10-day waiting period").

DOJ claims that Plaintiffs' requested relief "shows the weakness of their position" because it would require DOJ to permit the release of firearms before a background check is completed. Opp. at 27:24–28:5.[1] This ignores that the 10-day waiting period serves not only the government's interest in conducting a background check but also a "cooling off" period, *Silvester v. Harris*, 843 F.3d 816, 823–24 (9th Cir. 2016), which would still be served. It also ignores that the statute itself provides that firearms must be delivered if a background check begun within the 10-day period cannot be resolved due to an affirmative effort by DOJ that cannot be resolved § 28220(f)(4); that is, the statute acknowledges that background checks are not always "completed." Why is that? Because, as the United States Supreme Court recently reiterated, firearm purchasers are constitutionally entitled to take possession of their property unless the government determines that they are affirmatively prohibited from doing so, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,

[1] The Opposition also cites two cases to support the claim that "Courts have held that [DOJ] has a duty to complete its background checks." Both cases involved wrongful death claims alleging that DOJ did not adequately fulfill its statutory duties after individuals with prohibiting records lawfully obtained a firearm and then used it to commit suicide or murder. *Gray v. State of California*, 207 Cal.App.3d 151 (1989); *Braman v. State of California*, 28 Cal.App.4th 344 (1994). Neither case provides any guidance here.

--- S. Ct. ----, 2022 WL 2251305, at *7–11 (U.S. June 23, 2022), and "lengthy wait times" in otherwise-permissible regulatory regimes can violate the Second Amendment. *Id*. at *18 n.9. Plaintiffs' requested relief is entirely consistent with the statutory scheme and incentivizes DOJ to comply with Section 28220, which allows it to delay firearm transactions when the background check affirmatively reveals that a purchaser might be prohibited or ineligible to take possession of a firearm. Indeed, Plaintiffs' position is consistent with federal law, which permits firearms dealers to transfer a firearm if the federal background check system does not provide a response within three business days. 18 U.S.C. § 922(t)(1)(B)(ii); 28 C.F.R. 25.6(c)(1)(iv)(B) (where "the NICS has not yet responded with a 'Proceed' or 'Denied' response [after three business days], the FFL may transfer the firearm.").

The rest of the opposition is devoted to explaining why DOJ's efforts were good enough or should be excused.

**3. DOJ's Unlawful Policy And Practice Of Delaying Firearm Transactions Beyond The 10-Day Waiting Period Is Not Excused By The COVID-19 Pandemic.**

DOJ devotes much of its supposed argument that it complied with the law (Opp. at 23–28) by arguing its efforts at processing background checks were essentially good enough given the burdens imposed by the Covid-19 pandemic.[2] In its section titled "DOJ Complied with its Obligations Under California Law," the opposition actually takes the contrary position: DOJ invokes the doctrine of impossibility and argues that Plaintiffs' interpretation of the waiting period laws– that 10 days means 10 days – would lead to an "absurd" result under the circumstances.

Importantly, the very fact that DOJ invokes the "impossibility" canon of Civil Code § 3531 is an acknowledgment that Plaintiffs' interpretation of Section 28220 is correct. *See Nat'l Shooting Sports Found., Inc. v. State*, 5 Cal. 5th 428, 433 (2018) ("Impossibility can occasionally excuse noncompliance with a statute, but in such circumstances, the excusal constitutes *an*

[2] The Thompson declaration detailing these burdens ultimately reveals that the so-called "impossibility" here was an "operational and staffing issue." Thompson Decl., ¶ 39. Conspicuously missing from that declaration, however, is any explanation as to why the DOJ didn't allow this unit to work remotely during Covid, when it allowed many others to do so. Cal. Dep't of Justice, *Emergency Teleworking Policy – Coronavirus (COVID-19)* (March 16, 2020).

*interpretation of the statute* in accordance with the Legislature's intent, not an invalidation of the statute.") (italics in original). Indeed, DOJ also asks the Court to find that the so-called "impossibility" works an *implied exception* to Section 28220. Under *National Shooting Sports* and Civil Code 3531, however, DOJ cannot claim on one had that Section 28220 *allows* it to wait until after 10 days to begin background checks and simultaneously argue on the other hand that it should be *excused* from being required to conduct background checks in 10 days because doing so creates such an imposing "operational and staffing issue."

DOJ therefore cannot find solace in cases like *Sutro Heights Land Co. v. Merced Irr. Dist.*, 211 Cal. 670 (1931), where the Supreme Court declined to issue a writ of mandate directing an irrigation district to comply with state drainage laws because the agency lacked sufficient financial resources to do so. For one thing, the Court in *Sutro Heights* noted that while the drainage district "ha[d] not succeeded in discharging [its statutory] duty to its fullest extent," the district "recognize[d] the duty imposed upon it" and "endeavor[ed] to comply" with the statute. *Id.* at 704. Here, by contrast, DOJ *disputes* that Section 28220 means what it says.

The more urgent rule of statutory interpretation here is the doctrine of constitutional avoidance. *See People v. Garcia*, 2 Cal.5th 792, 815 (2017) ("The theory underlying the [constitutional avoidance] canon rests not only on a preference for avoiding the unnecessary resolution of constitutional questions, but also on the presumption that the Legislature (whose members have sworn to uphold the Constitution) did not intend to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.") (cleaned up). Here, the lurking issue is whether allowing DOJ unfettered delays of up to 30 days for a background check would violate the Second Amendment.[3] As noted in the Petition and the opening brief, DOJ had the option of asking the Governor to suspend Section 28220's operation under the Emergency Services Act, but that would have violated the Second Amendment. Petition, ¶ 11; Merits Br. at 13:12–20; *see also McDougall v. Cty. of Ventura*, 23 F.4th 1095 (9th Cir. 2022) (holding that

[3] California's 10-day waiting period is the second-longest in the country; only Hawaii imposes a longer delay (14 days). Haw. Rev. Stat. § 134–2(e); *see Silvester v. Becerra*, 138 S. Ct. 945, 945 & nn.1–2 (2018) (Thomas, J., dissenting from the denial of certiorari).

county public health order mandating closure of firearms dealerships violated the Second Amendment).[4] Instead, DOJ imposed the suspension unilaterally, and that is the crux of the dispute here. The opposition completely fails to engage with this important argument; it claims (at 29:4–5) dismissively that the Emergency Services Act is "irrelevant." Under the doctrine of constitutional avoidance, however, Section 28220 plainly cannot give DOJ the extreme leeway it claims here, so this argument is not just relevant, it is conclusive.

In any event, courts have rejected government agencies' claims that fiscal and administrative burdens excuse compliance with statutory duties under *Sutro Heights*. Indeed, it is worth noting that *National Shooting Sports*, 5 Cal.5th 428, *supra*, involved noncompliance with a statute by the *regulated* party, not the regulating party. In *King v. Martin*, 21 Cal.App.3d 791, 796 (1971), for example, the court explained that *Sutro Heights* "did not intend . . . to establish a generally applicable excuse from the performance of mandatory official duty wherever fiscal difficulty is shown." *See also*, *e.g.*, *Prof. Engineers In Cal. Gov't v. State Pers. Bd.*, 114 Cal.App.3d 101, 108 (1980) (quoting and following *King*). In such cases, the court's proper role is not to excuse an agency's failure to comply with the law, but to craft appropriate relief by "choos[ing] measures pointed toward assuring real compliance with official duties rather than rigidly to punish" the government. *King*, 21 Cal.App.3d at 796. To that end, it is appropriate for the Court to issue relief that confirms DOJ's statutory obligations and ensures that those obligations are not flouted in the future.

Under California law, moreover, the appropriate recourse for an agency faced with an inability to comply with a statute is not to violate it, but to seek relief from the Legislature. *Ass'n for Retarded Citizens v. Dep't of Developmental Servs.*, 38 Cal.3d 384, 394–95 (1985). And in this instance, DOJ could have appealed to the Governor to suspend the applicable laws under the Emergency Services Act. DOJ cannot adopt a policy and practice that conflicts with its statutory obligations and then seek refuge saying that actual compliance with the statute is impossible.

[4] The panel decision in *McDougall* was vacated for rehearing en banc, 26 F.4th 1016, and then vacated and remanded to the district court in light of the Supreme Court's opinion in *Bruen*, --- F.4th ----, 2022 WL 2338577 (9th Cir. June 29, 2022).

"Ignoring a statutory mandate nullifies the Legislature's valid purposes and results in tangible harm. If a statute requires an agency to dot its 'i's' and cross its 't's,' the Legislature's will must be done." *Marquez v. Med. Bd. of Cal.*, 182 Cal.App.4th 548, 550–51 (2010).

DOJ's reliance on the Ninth Circuit's decision in *United States v. Olsen*, 21 F.4th 1036 (9th Cir. 2022) does not change the calculus. In *Olsen*, the Court reversed the district court's dismissal of an indictment for violating the Speedy Trial Act resulting from pandemic-related court orders suspending jury trials. In reaching this conclusion, the Ninth Circuit held that the Act's "ends of justice provision" permitted the district court to consider and balance the circumstances that caused the delay and grant a continuance even in the absence of "literal impossibility." *Id.* at 1044–47. Here, however, we are faced with very different circumstance: It is not simply the case that DOJ claims that it was practically impossible to comply with the state's waiting period laws, such that its failure should be excused. Rather, DOJ implemented a practice based on asserted authority to delay firearm transactions "up to 30 days" without complying with the waiting period laws' express statutory limitations, and the agency continues to defend the legality of that practice as consistent with state law. Plaintiffs are entitled to a declaration that this policy and practice is invalid. *City of Cotati*, 29 Cal.4th at 79.

* * *

For the reasons set forth above and in Plaintiffs and Petitioners' moving papers, the Court should issue a writ of mandate, declaratory judgment, and injunctive relief as prayed for in the petition and complaint.

Dated: July 11, 2022

BENBROOK LAW GROUP, PC

By _____
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