No. D081134

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

MAURO CAMPOS ET AL.,
Petitioner and Plaintiff,

v.

ROB BONTA, ET AL.,
Respondents and Defendants.

San Diego County Superior Court, Case No. 37-2020-00030178-CU-MC-CTL
The Honorable John S. Meyer, Judge

APPELLANT'S OPENING BRIEF

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Case Name: *MAURO CAMPOS et al. v. ROB BONTA, et al.* Court of Appeal No.: D081134

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(Cal. Rules of Court, Rule 8.208)

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INTRODUCTION

California law requires the Department of Justice to conduct a background check for firearms purchasers and to notify firearms dealers if the buyer is prohibited from purchasing a firearm. For three months during the beginning of the COVID-19 pandemic in California, from April 5, 2020 through July 7, 2020, the Department faced delays in performing this statutory duty because of severe operational challenges it faced from social distancing, a simultaneous surge in firearms purchases, and two days of office closures due to social unrest. The Department's workload doubled, and on some days tripled, from historic norms. The Department continued to conduct background checks and allocated all available resources to the task. But because of the extraordinary confluence of events facing the Department, for a few months it took more time to complete all the background check applications that it received.

In August 2020, after the Department resolved the delays, firearms purchasers and interest groups filed this lawsuit. They sought a writ of mandate directing the Department to cease its purported "policy and practice of delaying firearm transactions beyond the 10-day waiting period" and a declaratory judgment stating that the Department's practices were invalid. (AA-26). The trial court granted the petition, requiring the Department to generally process all transactions within 10 days, without regard to any potential emergency circumstances that could prevent the Department from meeting that timeframe. The court further ordered that if the Department is unable to determine a purchaser's eligibility within that timeframe, it must allow

delivery of the firearm. The judgment lacks any basis in fact or law and should be reversed.

As a threshold matter, the trial court erred in not dismissing this case as moot. As noted, the Department resolved the backlog in background check applications before the complaint was filed. No backlog has recurred despite continuing high levels of firearms sales. None of the discretionary exceptions to mootness apply because the issues in this case were caused by an extraordinary situation that is unlikely to recur.

Turning to the merits, Plaintiffs did not establish that they were entitled to a writ of mandate directing the Department to cease implementing a purported policy of delaying firearms transactions. They failed to show that the Department acted arbitrarily, unreasonably, or in violation of the law when it continued to perform background checks outside the 10-day waiting period that applies to firearms purchases. The evidence overwhelmingly showed that the Department prioritizes completing background checks within 10 days and has never had a policy of delaying checks for up to 30 days as Plaintiffs claimed. The Department's policy has always been to put all available resources into completing background checks as quickly as possible. During the COVID-19 pandemic in 2020, the Department followed the statute and regulations as closely as it could under the circumstances, and did not violate its discretion in doing so. The Department's response to a temporary backlog, caused by a once-in-a-lifetime emergency, does not support the issuance of a writ constraining its future practice.

The trial court erred in granting of declaratory relief because there was no active controversy and the declaratory judgment fails to provide any effective relief. Even if there were an active controversy, the Court erred in granting judgment that would require the Department to approve transactions within 10 days, without exception, even in emergency situations in which the Department is unable to complete the background check due to circumstances beyond its control. A judgment instructing the Department to abandon a policy and practice that it never had, and ordering it to approve firearms applicants after 10 days no matter the circumstances, is contrary to the Department's duty to conduct a background check on all firearms purchasers, settles no active question of law, and serves only to create the potential for harm to public safety in the future if there is ever another emergency situation facing the Department.

STATEMENT OF FACTS

I. CALIFORNIA'S FIREARMS BACKGROUND CHECK SYSTEM.

Each time a person purchases a firearm in California from a federally licensed firearms dealer, the Department's Bureau of Firearms performs a background check under Penal Code section 28220 to determine whether the purchaser is eligible to complete the transaction and take possession of the firearm.[1] To initiate the background check, the dealer submits a "Dealer Record of Sale" (DROS) to the Department through the DROS Entry

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

System (DES) based on information provided by the purchaser. (AA-165.) Upon submission of the DROS information, "the Department . . . shall examine its records, as well as those records that it is authorized to request from the State Department of State Hospitals. . . in order to determine if the purchaser . . . is a person described in subdivision (a) of Section 27535 [prohibiting the purchase of more than one handgun or semiautomatic centerfire rifle during a 30-day period] or is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm." (§ 28220, subd. (a).)

The Department's process for completing the background check under section 28220 starts with an automated screening called a Basic Firearms Eligibility Check. (AA-165 [Thompson Decl. ¶¶ 7-8].) Under the Basic Check, the Department compares the applicant's information against DMV records, and sends inquiries to various state and federal electronic databases based on the applicant's name and date of birth, compiling the responses when the date of birth and name results in an exact or close match in those databases. (*Ibid.*; see also *Silvester v. Harris* (9th Cir. 2016) 843 F.3d 816, 825 [describing the process].) If no disqualifying information turns up in the Basic Check, and applicant information does not match any entries in any of the databases,[2] the application is automatically approved. (*Ibid.*) About 14% of all DROS applications are auto-approved through

[2] The search excludes records that contain only entries for employment or permits and do not include any criminal history information. (AA-165, fn. 1.)

the Basic Check process and do not need further review. (AA-166 [Thompson Decl. ¶13].)

Applications that are not automatically approved through the initial Basic Check process—approximately 86% of total applications—need to be reviewed manually by an analyst. These applications are placed into a queue and analysts in the Background Clearance Unit process them in the order that they are received, working on the oldest applications first. (AA-167 [Thompson Decl. ¶16].) An analyst reviews any database entries that match to the application. (*Ibid.*) If the records indicate the DROS applicant is not prohibited from purchasing a firearm, the analyst will approve the DROS, enabling the purchaser to obtain the firearm. (AA-167 [¶ 18].) Conversely, if the records matched during the Basic Check clearly indicate the DROS applicant is prohibited from purchasing or possessing a firearm, and no further research is needed, the analyst will deny the DROS. (*Ibid.*)

California law requires firearms dealers to wait 10 days before transferring a purchased weapon. (§§ 26815 and 27540.) The Department's objective is to review each transaction within California's mandatory 10-day waiting period. (AA-167 [Thompson Decl. ¶16].) The Department closely monitors all transactions in the queue to ensure proper personnel resources are available to process all transactions in a timely manner. (*Ibid.*)

Sometimes, the Department is unable to determine a person's eligibility before the conclusion of the 10-day waiting

period, often because the person's record reveals the existence of a mental health or criminal record suggesting that the buyer has a potentially disqualifying mental health hold or criminal conviction. (See § 28220, subd. (f)(1)(A); AA-167-168 [Thompson Decl. ¶¶ 19-21].) For example, this can happen when an arrest or criminal charge has been reported to a criminal records database, but the database shows no corresponding disposition. (AA-168-169 [Thompson Decl. ¶¶ 21-24].) In such a case, the Department is unable to determine from the record whether the person was convicted of the potentially prohibiting crime, and section 28220, subdivision (f) allows the Department to conduct additional investigation that can extend beyond the 10-day waiting period, for up to 30 days. (See also AA-168-169 [Thompson Decl. ¶¶ 21-24].) In the case of mental health holds, analysts regularly gather additional information from mental health hospitals to correct inaccurate information or ensure that a person is not prohibited. (*Ibid.*) The analyst will attempt to determine missing information that is pertinent to making an eligibility determination. (AA-168-169 [Thompson Decl. ¶¶ 21-24].) Analysts may contact listed reporting agencies, such as courts, police departments, hospitals, and military tribunals, for disposition information regarding noted arrests and mental health holds. (*Ibid.*)

The Department has adopted regulations to guide the review process. (See Cal. Code Regs., tit. 11, § 4230.) Throughout the review, the Department communicates with firearms dealers through its DES computer system. (See *id.* § 4230, subd. (b).) When the dealer submits an application, DES will show the

transaction as "Pending." (AA-165 [Thompson Decl. ¶ 9]; Cal. Code Regs., tit. 11, § 4230, subd. (b)(2)(A)).)

As the review progresses, the Department will inform the dealer through DES whether the transaction is "Approved" or "Denied" or "Delayed." (§ 28220, subd. (c); Cal. Code Regs., tit. 11, § 4230, subd. (b).) "An 'Approved' status shall be designated for a Department-approved application after the 10-day waiting period has concluded." (Cal. Code Regs., tit. 11, § 4230, subd. (b)(1)(A).) If the transaction is approved, the dealer may deliver the firearm at the conclusion of the 10-day waiting period, unless the purchaser is exempt.[3] (*Id.*, subd. (a).) If the transaction is denied, the dealer is prohibited from completing the sale. (*Ibid.*) The Department will indicate a "Delayed" status when it "is unable to determine the purchaser's eligibility within the 10-day period." (*Id.*, subd. (b)(2).) This occurs when an analyst, manually reviewing an application in the unprocessed queue, finds an incomplete record that needs additional review. (AA-167-168 [Thompson Decl. ¶¶ 19-21]; see also § 28220, subd. (f).)

When the DROS is marked "Delayed," the Department mails a copy of the notification to the DROS applicant stating that the DROS is delayed and explaining the process by which the DROS applicant may obtain a copy of the criminal or mental health

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[3] If the approval occurs more than 10 days after the purchase, the dealer may immediately release the firearm to the purchaser, following the Department's approval; i.e., the purchaser does not wait 10 days from the date of approval, but 10 days from the date of purchase. (§ 28220, subd. (f)(3)A).)

record that the Department has on file. (AA-168-169 [Thompson Decl. ¶ 24]; § 28220, subd. (f)(2).) When the analyst manually marks the DROS as "Delayed" within the DROS System, it updates DES with the "Delayed" status. (AA-168-169 [Thompson Decl. ¶ 24]; Cal. Code Regs., tit. 11, § 4230, subd. (b)(2)(B).)

The Department has 30 days from submission of the DROS to attempt to locate a disposition. (§ 28220, subd. (f)(4).) An "Undetermined" status "shall be designated when 30 days have passed since the original transaction date and the Department is unable to determine a purchaser's eligibility to own or possess firearms or is unable to determine whether the firearm involved in the sale/transfer/loan is stolen." (Cal. Code Regs., tit. 11, § 4230, subd. (b)(1)(B).) "An 'Approval after Delay' status shall be designated when the Department approves an application to purchase a firearm after identifying a 'Delayed Status.'" (Cal. Code Regs. tit. 11, § 4230, subd. (b)(1)(B).)

The Department's computer system allows dealers to transfer a firearm when the DES status is "Approved," "Approval after Delay," or "Undetermined." (Cal. Code Regs., tit. 11, § 4230, subd. (b)(1).) To transfer the firearm, the dealer must use the "Deliver Gun" function within DES, which allows the dealer to report delivery of the firearm. (*Id.*, subds. (a), (c)-(d).) When an application is "Pending," "Denied," or "Delayed," dealers do not have the option to deliver the firearm. (*Id.*, subd. (b)(1)(C).) There

is no status in DES that corresponds to an application that is being approved without any background check.[4]

II. THE DEPARTMENT RESPONDED TO THE COVID-19 PANDEMIC AND DRAMATICALLY INCREASED GUN SALES.

On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency in California as a result of the threat of COVID-19. (https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf> (as of February 8, 2023).) On March 13, 2020, then-President Donald Trump likewise proclaimed the United States to be in a state of national emergency due to the COVID-19 outbreak. (https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (as of February 8, 2023).)

On March 16, 2020 Governor Newsom issued Executive Order N-33-20, stating that COVID-19 had "rapidly spread throughout California" and directing Californians to stay home for the preservation of public health and safety in compliance with directives from the Department of Public Health. (https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-signed.pdf> (as of February 23, 2023).) Directives ordered Californians to shelter

[4] In addition to the status designations discussed above, the regulations include designations for "Denial after Delay," "DMV Reject," and "30-Day Reject". (Cal. Code Regs., tit. 11, § 4230, subd. (b)(2)(E)-(F).)

at home unless they needed to perform authorized necessary activities, in which case, "they should at all times practice social distancing." (*Ibid.*)

Schools, childcare centers, government buildings, and businesses reduced operations or closed entirely. Courts temporarily reduced or completely suspended operations, including criminal jury trials. (See e.g. *United States v. Olsen* (9th Cir. 2022) 21 F.4th 1036, 1041 [recounting general orders suspending criminal trials from March 2020 through approximately May 2021].)

During this upheaval, firearms sales increased dramatically to unprecedented levels. The 2020 calendar year began with sales slightly below what they had been at the beginning of the prior year. (AA-386 [Martinez Decl., Ex. B, "Daily Applications Incoming 2019 vs. 2020"].) For example, in January and February 2020, the number of applications to purchase a firearm submitted to the Department averaged approximately 2,000 applications per day. (*Ibid.*) By mid-March, as the pandemic took hold, firearms sales were surging. (AA-170 [Thompson Decl. ¶ 29].) On March 17, 18, and 19 the Department received over 9,000 applications each day, up from around 2,000. (AA-170 [Thompson Decl. ¶¶ 29-30].) And on March 20, it received over 7,600—a slight drop from the days prior, but still nearly three times what would have been expected. (*Ibid.*) For the full month of March, the Department received approximately 140,000 applications to be processed, as compared to the 85,000 that it received in the same month the year before, with much of the

increase coming in in the latter half of the month. (AA-386 [Martinez Decl., Ex.B].) The surge continued for the rest of 2020, with October 2020 having nearly twice the number of applications as October 2019, and November and December also seeing steep increases as compared to the year prior. (*Ibid.*)

And amid the trend of greatly increased sales throughout the remainder of the year, there were also intermittent peaks above the already elevated numbers. On June 1 and June 2, social unrest caused the Governor to close California government offices statewide. (AA-171; AA-348-349.) On those days, firearms sales again surged. On June 1, 2020, the Department received 4,685 applications (AA-265), and on June 2, 2020, it received 6,683 (AA-266.) Sales remained above 5,000 per day for several more days (AA-267-270.)

III. THE DEPARTMENT CONTINUED TO PROCESS BACKGROUND CHECKS BUT COULD NOT COMPLETE ALL CHECKS WITHIN CALIFORNIA'S 10-DAY WAITING PERIOD.

The Department monitors DROS entries and projects incoming numbers in order to adjust staffing resources to meet changing demands. (AA-169 [Thompson Decl. ¶ 27].) For example, in the past, the Department has anticipated and staffed for seasonal increases in firearms sales (like at Christmas) and temporary increases in sales due to changes in the law. (*Ibid.*) But in March 2020, the Department faced an unprecedented surge in firearms sales that it could not have anticipated. (*Ibid.*)

The Department immediately took steps to address the surge in applications. Notwithstanding COVID-19, Department staff continued to report to work at their physical office locations

throughout the pandemic to process applications. (AA-171 [Thompson Decl. ¶ 36].) The Department closely monitored the number of daily DROS applications received and prioritized processing of the applications. (*Id.* at ¶ 27, Exh. A [morning emails from March 4 through August 20, 2020][5].) Employees worked under the constraints of the pandemic, which included some analysts needing to stay home due to illness or exposure, having an increased medical risk from serious complications related to COVID, and other staff taking leave due to the need to care for sick family members or children whose schools and daycares had closed. (AA-170-71 [Thompson Decl. ¶¶ 32-33].)

Even with temporarily reduced capacity, the Department maintained productivity. (See AA-388 [showing applications processed, monthly, in 2020 compared to 2019].) To conduct as many background checks as possible within the 10-day waiting period, the Department began implementing all feasible measures to counteract its COVID-related operational and staffing issues, including redirecting staff from other units within the Department. (AA-170-71 [Thompson Decl. ¶ 39-40].) The Department treated this as an "all hands on deck" situation. (*Ibid.*) The Department maintained and even increased capacity

[5] The Department sends an email each day tallying the numbers of applications received and processed the day prior, the length of the queue of applications to be processed, and the age of the oldest application in the queue. (AA-169-170.) The Department submitted an exhibit that includes the morning emails from March 4 through August 20, 2020. (AA-169-170, AA-174-346.)

through flexible schedules and a mix of voluntary and mandatory overtime to increase processing capacity, and moved cubicles to accommodate social distancing. (AA-172 [Thompson Decl. ¶¶ 41, 43].) Staff worked on weekends and early in the mornings. (*Ibid.*) The Department also expedited ongoing hiring efforts. (AA-172 [¶43].) However, hiring efforts were at best a long-term solution, as analysts typically need six months of training to be able to adequately conduct background checks independently. (AA-354-356 [Tobia Decl. ¶¶ 4, 10].).

During this time, the Department placed the following message on its website, notifying dealers and firearms purchasers that the impact of COVID-19 could lead to background checks completed after the expiration of the 10-day waiting period but that the Department would continue to strive to complete checks in the shortest time possible:

> Under Penal Code section 28220(f)(4), the Department of Justice (DOJ) has up to 30 days to complete background checks on purchasers of firearms and ammunition. Prior to the COVID-19 pandemic, DOJ typically completed these checks within Penal Code Section 26815(a)'s 10-day waiting period. COVID-19 protective measures have impacted the ability to increase the personnel resources in the DROS unit to address the recent sustained increase in firearms and ammunitions transactions without compromising the health and safety of our employees and the community. As a result, firearms and ammunitions dealers and purchasers should know that as DOJ employees *continue to perform the statutorily required background checks* throughout the COVID-19 pandemic, circumstances *may compel* that background checks are completed after the expiration of the 10-day waiting period for firearms purchases. DOJ will continue to

> strive to provide the best service and *complete these checks in the shortest time possible.*

(AA-124, emphasis added.)

In March 2020, despite all of the challenges posed by the outbreak of the pandemic, staff conducted approximately 103,000 background checks, whereas in the prior year in March they conducted 69,000. (AA-388 [Martinez Decl., Ex. C].) These numbers do not include the percentage of applications that were auto-approved. (*Ibid.*) Staff continued this trend of processing significantly more applications, year-over-year throughout 2020. (*Ibid.*) Some months, including July and September, staff processed double the number of applications that they processed in 2019. (*Ibid.*) For example, in July 2019, staff processed about 51,000 applications, while in July 2020, they processed over 109,000. (AA-388.)

Daily DROS emails closely monitoring the Department's processing of applications show that on April 5, 2020, the oldest applications in the queue to be reviewed had been received more than ten days prior, the first time that data point exceeded ten days. (AA-205.)[6] They also show the Department's efforts to keep up with the dramatic increase in applications and that, at one time, the oldest applications in the queue had reached 18 days. (See AA-228-236.)

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[6] A DROS application that is over 10 days old is in "day 11," according to the Department's usage in the "DROS morning emails." (See AA-171 [¶ 38].)

By July 6, 2020, the Department was again processing all applications within the 10-day waiting period and has continued to do so. Firearm sales did not appreciably decline in 2020, but following July 2020, the Department continued to process all applications within the waiting period, as it did before COVID-19. (AA-172 [Thompson Decl. ¶¶ 45-46].)

IV. AFTER THE UNFORESEEN CIRCUMSTANCES CAUSING DELAY WERE RESOLVED, PETITIONERS FILED THEIR PETITION FOR WRIT OF MANDATE.

On August 27, 2020, Petitioners filed a Verified Petition for Writ of Mandate and Complaint for Declaratory Relief claiming that officials at the Department had "used the DOJ's Dealer Record of Sale ("DROS") Entry System . . . and the COVID-19 pandemic as an opportunity to undermine and restrict citizens' access to firearms in violation of California's statutes and regulations governing firearms transactions." (AA-7 [Pet. ¶ 1].) Petitioners alleged that California's "statutory scheme allows DOJ to 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 for one of the three reasons given in section 28220, subdivision (f)(1)(A). (AA-8-9 [Pet. ¶ 8], original emphasis.)

Petitioners sought a writ of mandate compelling the Attorney General, Director of Bureau of Firearms, and Department of Justice to take three actions. First, where an application cannot be processed within California's 10-day waiting period and such applications are not designated as

"delayed" under section 28220, subdivision (f) (used where a check has been performed and a partial record has been found that needs more research), Petitioners demanded that the Department approve the applications, even if the Department has been unable to perform any background check on the applicant. (AA-23, AA-26 [Pet. ¶ 59 & p. 20]; see also AA-61 [Pet.'s Br. at p. 10].) Second, Petitioners sought authorization for "firearms dealers to deliver firearms to purchasers and transferees after 10 days, except where Respondents comply with the statutes to extend the 10-day waiting period under three specific and enumerated circumstances set forth in Penal Code section 28220(f)(1)(A)." (AA-26.) Third, where a transfer is delayed up to 30 days for additional research into a partial record under subdivision (f)(3), Respondents wanted the Department to "immediately notify the dealer" of the reason(s) for any delay and inform the purchaser about the delay pursuant to section 28220, subdivision (f). (*Ibid.*)

Petitioners also asked for related declaratory relief under Code of Civil Procedure section 1060: (1) "That DOJ may not use the DROS Entry System to leave an individual in 'Pending' status after expiration of the 10-day waiting period under Penal Code section 28220 and 11 CCR section 4230," and (2) "That DOJ may not delay firearm transfers beyond the initial 10-day waiting period except in the three specific and enumerated circumstances set forth in Penal Code section 28220(f)(1)(A)." (AA-24, AA-26 [Pet. ¶ 63 & p. 20]; see also AA-61 [Pet.'s Br. at p. 10].)

V. ARGUMENTS BELOW AND JUDGMENT.

At the writ hearing in July 2022, the Petitioners presented no evidence of current delays by the Department, and their sole piece of evidence regarding a purported policy to delay background checks was the Department's statement on its website regarding delays caused by COVID. (AA-124-125.) Petitioners interpreted the statement as a "claim[] that Section 28220(f) gives [the Department] the authority to delay a firearm transaction up to 30 days for any reason (or no reason at all)." (AA-58.) Petitioners also presented the Department's discovery responses, which set forth data describing the number of background checks conducted after 10 days during Spring and early Summer 2020. (AA-68-130.)

The Department presented declarations to show that it had dramatically increased its processing of background checks, and that delays (which were of a maximum of 18, not 30 days), were compelled by the pandemic-created circumstances and social disturbances evident at that time. (AA-170-172) [Thompson Decl. ¶¶ 29-46]; see also AA-386 [Martinez Decl., with chart showing daily applications incoming 2020 compared to 2019].) Analysts prioritized completing checks within the 10-day waiting period. (*Ibid.*) The Department instituted mandatory and optional overtime, and maintained its operations seven days a week to try to do so. Still, for three months early in the pandemic, the volume of applications was too great to process within the 10-day waiting period. (*Ibid.*)

The Department argued that the controversy was moot. (AA-149-152.) Additionally, it argued that the Department had not

abused its discretion in continuing to perform background checks and had no policy of delaying checks beyond the waiting period. (AA-154.) To the extent that the Court found that section 28220 required a background check to be completed in 10 days, the Department asked the court to find that the emergency situation that occurred provided an implied exception to the rule, because to do so would further the intent of the statute that background checks be completed. (AA-159.)

At the hearing, counsel for the Department described the evidence showing that the Department faced an extraordinary challenge with processing incoming applications and attempted to process them within 10 days. (See RT 7-8.) Although the Department explained that a writ would not have any immediate effect on its daily operations, since it was processing applications within 10 days except for those delayed for further investigation, it expressed concern that in another "unpredictable situation" where it again could not process background checks in ten days, a writ would compel the Department to process all applications within ten days, and if not, to allow purchase even when an individual might be prohibited from obtaining a firearm. (RT 8-9.)

In its ruling, the Court found that the case was not moot because the Department of Justice "ha[d] not rescinded the challenged policy—i.e., the Department continues to claim that section 28220(f) provides up to 30 days to complete firearm background checks for any reason. The record indicates the challenged policy remained publicly posted as recent as May 26,

2022, and the petitioners assert it continues to remain live on the website." (AA-415.) Turning to the merits, the Court also determined that "[b]oth the statutory and regulatory scheme show the Department's background check review is based on a 10-day waiting period." The court held that section 28220, subdivision (f), allows delay only for the three specified reasons stated in the statute: "Had the Legislature wished to create a broader allowance for a 30-day delay whenever the DOJ determined additional time is needed, it would have done so. It did not." (AA-417.)

The Court declined to find an "implied exception" for the COVID-induced emergency that had occurred. (AA-417-418.) The court found it relevant that "[h]ere, respondents do not take the position that they knew they were required to comply with the 10-day period and only delay based on the three enumerated circumstances by section 28220(f), and yet could not do so due to impossible circumstances created by the pandemic. Instead they took the position that they have authority to wait more than 10 days to conduct the background checks whenever the Department determines more time is needed, and that they complied with the statute to the best of their ability under the circumstances. Thus respondents have not shown the implied exception for noncompliance based on impossibility applies here." (AA-417.) The court suggested that the Department could avoid approving applications without a background check by seeking an emergency order from the Governor under the Emergency Services Act, Gov. Code section 8550 *et seq.* (AA-417.)

The court's final judgment granted the petition for writ of mandate, and declared that the Department's "policy and practice of delaying firearm transactions beyond the conclusion of the waiting period described in Penal Code sections 26815 and 27540, absent a statutory basis to delay the transaction as permitted by Penal Code section 28220, subdivision (f)(1)(A), is unlawful." (AA-413.)

The judgment also provided that "a writ of mandate shall issue as follows: Respondents are directed to cease their policy and practice of delaying firearm transactions beyond the conclusion of the waiting period described in Penal Code sections 26815 and 27540, absent a statutory basis to delay the transaction . . . . If after conclusion of the waiting period described in Penal Code sections 26815 and 27540 Respondents have been unable to determine a purchaser's eligibility to purchase a firearm, Respondents shall allow delivery of the firearm, except where Respondents comply with Penal Code section 28220, subdivision (f)(1)(A)." (AA-413.) The court retained jurisdiction as necessary to enforce the judgment and the writ of mandate to be issued thereunder. (AA-413.)

STATEMENT OF APPEALABILITY

This appeal is from a final judgment. (AA410.) A final judgment is appealable. (Code Civ. Proc., § 904.1, subd. (a)(1).)

ISSUES PRESENTED

I. Where uncontested facts showed that delays in conducting background checks for three months in 2020 were due to COVID-19 and other factors and are no longer occurring,

did the court err in not dismissing this action as moot and abuse its discretion in considering the issues raised in the absence of evidence that such delays were likely to recur?

II. Did the trial court err in granting the request for a writ of mandate where section 28220 requires the Department to conduct background checks on firearms applicants, the Department's policy and practice is to process all applications within 10 days except when necessary to conduct further investigation as permitted by statute, and the three-month backlog in 2020 was caused by unprecedented circumstances that made it impossible for the Department to complete background checks for all transactions within ten days?

III. Did the trial court err in granting declaratory relief that would generally require background checks be completed within 10 days, without exception for emergency circumstances?

STANDARD OF REVIEW

Petitioners sought a writ of mandate under Code of Civil Procedure section 1085, which permits the trial court to review agency action for abuse of discretion. (See *Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1003.) Generally, in reviewing a grant of a petition for writ of mandate, an appellate court "applies the 'substantial evidence' test to the trial court's findings of fact and independently reviews the trial court's conclusions on questions of law, which include the interpretation of a statute and its

application to undisputed facts." (*CV Amalgamated LLC v. City of Chula Vista* (2022) 82 Cal.App.5th 265, 280; see also *Association of Deputy District Attorneys v. Gascon* (2022) 79 Cal.App.5th 503, 522-523 ["To the extent we review the trial court's interpretation of relevant laws and their application to undisputed facts, our review is de novo."].)

A judgment granting declaratory relief is reviewed de novo on the question whether the dispute presents "an 'actual controversy' within the meaning of the statute authorizing declaratory relief (Code Civ. Proc., § 1060), as opposed to purely hypothetical concerns." (*Artus v. Gramercy Towers Condominium Assn.* (2018) 19 Cal.App.5th 923, 930; *American Meat Inst. v. Leeman* (2009) 180 Cal.App.4th 728, 741.)

The standard of review that applies to a grant of declaratory relief depends on whether the grant relies on undisputed facts. Where facts are disputed, a trial court's decision to exercise its power to grant declaratory relief is typically reviewed under an abuse of discretion standard of review. (*Hirshfield v. Cohen* (2022) 82 Cal.App.5th 648, 659; see also Code Civ. Proc., § 1061). However, "in a declaratory relief action where . . . the decisive underlying facts are undisputed, [the court's] review of the propriety of the trial court's decision presents a question of law which [courts] review de novo.'" (*Hott v. College of the Sequoias Community College Dist.* (2016) 3 Cal.App.5th 84, 95-96.) Review of statutory construction is also de novo. (*Ibid.*, citing *Cal. Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1041.)

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING RELIEF BECAUSE THE FACTS SHOWED THE ISSUE WAS MOOT.

A. The uncontested facts showed that the Department resumed its normal practice of conducting background checks within the 10-day waiting period by July 2020.

The trial court should not have granted Plaintiffs any relief because uncontested facts showed that the issue was rendered moot before the filing of the Petition. By July 2020, the Department was again reviewing and approving applications (unless further follow-up was necessary) within the 10-day waiting period, and no longer had any applications received more than 10 days prior. (See AA-172; see also generally AA-397-408 [reply brief, not disputing that delays were no longer occurring].) "California courts will decide only justiciable controversies." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573, citations omitted (*Wilson*).) "A case is moot when the decision of the reviewing court 'can have no practical impact or provide the parties effectual relief.'" (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.) "Stated differently, moot cases 'are "[t]hose in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist."' (*Parkford Owners for a Better Community v. County of Placer* (2020) 54 Cal.App.5th 714, 722, quoting *Wilson*, 191 Cal.App.4th at p. 1573.) Courts "will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal." (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557.) "The

pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief." (*Wilson*, 191 Cal.App.4th at p. 1574.)

The Petitioners did not contest any of the evidence presented by the Department showing that the delays ended in July 2020. (See AA-397-408 [reply brief].) The facts showed that since July 7, 2020, the Department has been able to conduct background checks consistent with the Petitioners' interpretation of section 28220. Since that date, the Department has completed background checks within the 10-day waiting period, or extended the background check process under section 28220, subdivision (f)(3) where that section applies. The facts also showed that the Department's prior inability to do so in late Spring and early Summer 2020 was due to urgent COVID-19 public health measures, closures due to public disturbances, and the simultaneous and unprecedented surge in firearms purchases that took place at the same time. (AA-169-173, AA-386.) The Department successfully resolved the unusual processing challenges by July 7, 2020. (AA-300 [last daily email showing processing of applications in a day beyond the tenth day].) All of the background checks at issue in the Petition have concluded.[7]

[7] The two individual plaintiffs Mauro Campos and Skyler Callahan-Miller received their firearms before the complaint was filed. (AA-19-20 [¶¶ 47-48].) The institutional plaintiffs did not identify any members or other firearms purchasers whose purchases were subject to delays after July 7, 2020. (See Complaint, generally, AA-17-21.)

Nevertheless, the Petitioners argued, and the trial court agreed, that the dispute was not moot because "there was an ongoing dispute over the lawfulness of [the Department's] practice of delaying firearm transfers." (AA-398 [Pet.'s Reply Br.]; AA-415 [Order].) The court found the Department's statement on its website, placed there to inform the public of the temporarily longer processing time in performing background checks (see AA-124-125), kept the matter justiciable: "The record indicates the challenged policy remained publicly posted as recent as May 26, 2022, and the petitioners assert it continues to remain live on the website." (AA-415.)

The trial court and Petitioners misinterpreted the statement on the website to be a public announcement of a policy to take 30 days to conduct a background check for any reason at all. (See RT-6 [court, characterizing the Department's policy as, "because of COVID we're too busy in every case. It's just we can't do it in every case so there's no 10-day waiting period, it's now 30 days."].) That discounts the Department's repeated assertions that it has a policy and practice of conducting background checks expeditiously and within the 10-day waiting period. (AA-169-172; RT-7-8.) It was only because of an unexpected surge in firearm sales, happening when the office had to respond to a widespread shutdown and global pandemic, followed by office closures due to social unrest, that the Department took more than ten days to check some pending applications. The substantial number of background checks conducted, and the fact that the Department never took close to 30 days to conduct checks during the three

months of delays shows that the Petitioners' and trial court's broad interpretation of the website statement is wrong. The Department was not asserting its ability to take 30 days, for whatever reason to conduct background checks. It was alerting the public to the impact of COVID-19 on the background check process, while affirming that the Department would continue to conduct background checks during the COVID shutdowns that were occurring across the state, and that it would do so "in the shortest time possible." (AA-125.) Since there were no ongoing delays to be remedied, and no policy to go over 10 days to conduct a background check (except for when compelled to do so), there was no effective relief to be granted by the trial court in this case.

Even if the statement on the website were an announcement of a policy, the matter would still be moot, as it is clear from the evidence presented that the Department is not following such a policy: non-delayed background checks (under section 28220, subdivision (f)(3)) took longer than 10 days only for three months during 2020, and even then, took, at longest 18 days (and an average of 13 days, according to Petitioners' own calculations) (AA-59, fn. 4).

B. The discretionary exceptions to mootness do not apply.

Where a case is moot, a court may grant review if one of "three discretionary exceptions" to mootness apply: "(1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination

[citation.]." (*Epstein v. Superior Court* (2011) 193 Cal.App.4th 1405, 1411.) None of the conditions required for mootness were present here.

1. The issues involved in this case were unique to the beginning months of the COVID-19 pandemic and are unlikely to recur.

An exception to the rule of mootness exists "where the question to be decided is of continuing public importance and is one 'capable of repetition, yet evading review.'" (*In re Christina A.* (2001) 91 Cal.App.4th 1153, 1158; see also *Cerletti v. Newsom* (2021) 71 Cal.App.5th 760, 766 ["A court may resolve an otherwise moot case if it raises an important issue likely to recur, but which regularly evades timely appellate review"].) While the amount of time it takes to complete a firearms background check involves an issue of broad public interest, this exception to mootness does not apply for two independent reasons. First, the controversy is unlikely to recur. The confluence of events that led to the delays in this case are unlikely to happen again. Second, although there is a general public interest in background check timing, that does not mean there is a continuing interest in resolving this moot case. To the contrary, resolving this case in the absence of a current controversy poses a risk to public safety in the future in the unlikely event of an emergency that renders the Department unable to complete background checks within 10 days.

The Department's policy and practice is and always has been to complete firearms background checks within the 10-day waiting period (AA-167 [Thompson Decl. ¶ 16]), to specifically

delay firearms transactions under section 28220, subdivision (f), when that subdivision applies, and to follow each of section 28220's requirements. (AA-169 [Thompson Decl. ¶ 24].) During the pandemic, the Department continued its operations, and implemented all feasible measures to counteract operational and staffing issues to try to meet the surging demand for background checks within the 10-day waiting period. (AA-171 [Thompson Decl. ¶¶ 36, 37-39].) The Department redirected staff from other units within its Bureau of Firearms and redirected nearly all qualified personnel to process DROS transactions and instituted a combination of voluntary and mandatory overtime. (AA-172 [Thompson Decl. ¶¶ 40-41].) And staff physically came into the office to do so while a majority of the workforce, including other state employees, worked remotely. Only because of an extraordinary confluence of unprecedented events, including a global pandemic, shutdown, civic unrest, and accompanying surge in gun-buying, did the Department take longer than ten days to perform its background checks. (AA-173 [Thompson Decl. ¶ 46].)

The Petitioners argued, and the trial court appears to have implicitly agreed, that mootness did not apply because the Department's interpretation of the law could again be applied in the future. (*See* AA-397 [Pet.'s Reply Brief].) However, other courts have dismissed actions arising out of the COVID crisis as moot once responsive measures were rescinded or modified. For example, in *Brach v. Newsom,* the Ninth Circuit, sitting en banc, held that a COVID-caused controversy was moot. (*Brach v.*

Newsom (9th Cir. 2022) 38 F.4th 6, 12.) The case involved a challenge to the Governor's blueprint for reopening schools, which by the time the court was hearing the case, was no longer in effect. (*Ibid.*) The court "join[ed] numerous other circuit courts across the country that have recently dismissed as moot similar challenges to early pandemic restrictions." (*Ibid.*) The plaintiff's speculation that the controversy could recur (by the Governor again suspending in-person instruction) was insufficient reason to hear the case. (*Ibid.*) The court determined: "It could not be clearer that this case is moot." (*Ibid.*)

Likewise, the controversy here is moot and is unlikely to recur. As the Court recognized in *Brach*, "the situation in California has changed dramatically with the introduction of vaccines and other measures." (*Id.* at p. 9.) As relevant to the issues in *Brach,* these changes resulted in the re-opening of schools and California rescinding its challenged blueprint for reopening of schools. *Ibid.* As relevant here, these same changes mean that the type of emergency that faced the Department in *this* case is also unlikely to recur. The delays that occurred in this case were as inextricably intertwined with the early days of the COVID epidemic as was the challenged blueprint in *Brach*. In *Brach*, the plaintiffs also argued that the case was not moot because the State could again enact the challenged policy. *Ibid.* The Court rejected this idea:

> The parents urge us to decide this case anyway, suggesting that California might, one day, close its schools again. In effect, the parents seek an insurance policy that the schools will never ever close, even in the face of yet another unexpected emergency or

> contingency. The law does not require California to meet that virtually unattainable goal; our jurisdiction is limited to live controversies and not speculative contingencies.
>
> (*Ibid.)*

The trial court distinguished *Brach* on grounds that "the respondents have not rescinded the challenged policy—i.e., the Department continues to claim that section 28220(f) provides up to 30 days to complete firearm background checks for any reason." (AA-415.) But the driving reason that the case in *Brach* was moot was not just that the State had rescinded its policy (the Governor could reenact the policy at any time, the Plaintiffs argued), but instead that it was unlikely, based on the changed COVID environment, that the policy would ever be put into effect again. (*Brach*, *supra*, 38 F.4th at p. 15 ["The challenged orders have long since been rescinded, the State is committed to keeping schools open, and the trajectory of the pandemic has been altered by the introduction of vaccines, including for children, medical evidence of the effect of vaccines, and expanded treatment options."].)

Here, there was no "policy" to rescind. The substantial evidence in the case does not support the trial court's determination that the Department had a policy of taking up to 30 days to complete firearm background checks "*for any reason*" (see AA-415.) The Petitioners and trial court conflated a message that the Department posted on its website to warn the public of unavoidable delays due to COVID with the Department's overall policy for processing firearms applications. That message merely

cited the plain language of section 28220 granting the Department up to 30 days to conduct background checks. (AA-124-125.) And it explained that the COVID crisis could temporarily lead to delays in processing transactions. But it made clear that there was no "policy" of delay, confirming that the Department "will continue to strive to provide the best service and *complete these checks in the shortest time possible.*" (*AA*-125, emphasis added.)

Because the 2020 delays are unlikely to recur, the cases Petitioners relied on below are inapposite. For example, in *Communities for a Better Environment v. State Energy Resources Conservation & Dev. Commission* (2017) 19 Cal.App.5th 725, 733, the court held that a constitutional challenge to the review procedure for utility licenses, which required that challenges be brought as a matter of first impression in the Supreme Court, was ripe despite there being no active controversy. The court noted that the constitutional challenge did not depend on the facts of any particular proceeding. The Plaintiffs also alleged they were in a Catch-22. *Id.* at pp. 497-498. They had already received review by the Supreme Court, although in a summary fashion, and any writ filed in an inferior court would therefore be subject to dismissal. *Ibid.* There was also no argument that that the challenged policy would not again come into play. In contrast, the challenged practice here (leaving background checks pending for more than 10 days), is one that the Department was forced to engage in because of emergency conditions that are unlikely to recur. And if the Department again was forced to resume any

practice inconsistent with what the plaintiffs think is required by law, the action would not be unreviewable, as in *Communities for a Better Environment*. Petitioners could file a writ and seek an emergency injunction.

For similar reasons, this case is distinguishable from cases cited by Plaintiffs involving building development policies and approvals. (See e.g. *Env't Def. Project of Sierra Cty. v. Cty. of Sierra* (2008) 158 Cal.App.4th 877 [involving a county's procedure for consideration of developer applications].) A pandemic, a gun-buying surge, and social unrest created a uniquely difficult situation that is unlikely to recur. In contrast, where there is a challenge to a building development approval procedure in common use, but no live controversy before the court, the court may be sure that another development application is around the corner and the policy likely to be again invoked.

More instructive is *Cerletti v. Newsom*, *supra*, which dealt with COVID payments to undocumented immigrants during the pandemic. The Plaintiffs argued that the one-time COVID payments to undocumented immigrants violated federal law because the payments had not been legislatively approved. (71 Cal.App.5th at pp. 763-764.) After the trial court declined to issue a restraining order, state officials distributed the money. (*Ibid.*) On appeal, the court determined the controversy was moot and not capable of repetition yet evading review. (*Id.* at p. 766.) The court reasoned: "The Project was an emergency project to provide one-time payments during an extraordinary pandemic, which caused a state of emergency and a temporary pause in the

operation of the Legislature; there . . . is nothing in the record suggesting that it is likely to recur." (*Id.* at p. 766.)

Other courts have also recently found COVID controversies moot, in part because the changing nature of the pandemic has made it unlikely that States and communities will experience the same confluence of events that befell 2020. (*See e.g. Clark v. Governor of New Jersey* (3rd Cir. 2022) 53 F.4th 769, 778 ["Regarding the likelihood that the same pandemic conditions we faced in 2020-21 will repeat themselves, it is hard to imagine that we could once again face anything quite like what confronted us then. Moreover, the public health outlook has changed dramatically since the dark days of March 2020 . . . ."].)

All of the evidence in this case shows that the Department's struggles to conduct background checks within 10 days in 2020 were caused by the pandemic, the surge, and public disturbances, and that the underlying causes are unlikely to recur.

2. Recurrence of the controversy between the parties is unlikely.

Courts also have discretion to review the merits in a moot case where there is likely to be a recurrence of the controversy between the same parties to the lawsuit. In cases concerning issues for which there is a broad public interest, this question can overlap with issues presented in the above exception to mootness. For example, in *Department of Water Resources Cases* (2021) 69 Cal.App.5th 265, 275, the court considered a controversy between the County of Sacramento and the State Department of Water Resources regarding a drilling project that had been completed. The court held there was discretion to hear the moot case in part

because the parties were likely to have the same conflict in the future, and also that the chance of recurrence of the issue in another county was likely and presented an issue of broad public interest. (*Id.* at p. 275-276.) In making this decision, the court relied on the County's request for judicial notice, which showed that that the Department of Water Resources was continuing to conduct exploratory drilling in Sacramento County related to the disputed project. (*Ibid.*) The County also argued that the "case presents an issue of broad public interest that is likely to recur because the project affects no fewer than five counties, the state 'will undoubtedly have reason to conduct drilling in the future,' whether for the project or for some other State purpose, and the issue of groundwater quality is generally of broad public interest."

In this case, the issues are unlikely to recur between the parties for the same reasons that they are unlikely to recur at all: the delays at issue in this case were caused by a once-in-a-lifetime confluence of events that are unlikely to recur, and the Petitioners presented no evidence that they would recur between the parties, or recur at all.

3. There was no material question left to resolve in a manner that would provide future guidance.

As to the third exception, there was no material question remaining for the court's determination. Courts decline to exercise discretion over moot cases where "any resolution would be unlikely to provide guidance for future . . . disputes. (*See MHC Operating Limited Partnership v. City of San Jose*, *supra*, 106

Cal.App.4th at p. 215 [declining to exercise discretion to resolve moot questions where "resolution would be unlikely to provide guidance for future rent control disputes, because the two issues presented in the City's appeal are essentially factual in nature and therefore require resolution on a case-by-case basis].")[8]

Here, neither the judgment nor the proposed writ provide meaningful guidance when it comes to processing firearms applications for several reasons. A writ directing the department to "cease their policy and practice of delaying firearm transactions beyond the conclusion of the waiting period" is not meaningful on a day-to-day basis, since the Department's policy has always been to process applications within the 10-day period—approving, denying, or delaying for further review based on "hits" in the databases. (AA-167.) It was only because of impossibility that the Department could not continue this practice through the beginning months of the pandemic. (See *supra*, at pp. 20-23, 34-35.) But that backlog has been resolved and no longer requires court review, if it ever did.

And more problematic from a public safety perspective is when the judgment *would* potentially apply. If it were to apply at all, it would likely be in another unanticipated situation where the Department could not process all applications within the 10-

[8] A separate writ in this case has not issued, but the court granted the petition for a writ of mandate and signed the judgment, which states that "A writ of mandate shall issue as follows" and then describes the content of the writ. (AA-413.)

day waiting period, such as may occur in a natural disaster like a major earthquake or a cyberterrorism attack. In such a situation, the judgment as written would require the Department to allow firearm transactions to proceed after 10 days even if a background check could not be conducted. This would result in prohibited people purchasing firearms. During the delays that occurred in this case, for example, 3,612 of the applications that took longer than 10 days were ultimately denied. (AA-59.) The judgment also does not provide guidance on how approving unchecked background check applications could be accomplished in a situation where the Department is again unable to complete background checks as required under section 28220. Nor could it, as it is impossible to predict if and when a similar inability to conduct background checks within the 10-day waiting period would arise, however unlikely that may be. The Department's hands should not be tied in a future emergency situation based on a ruling in this now-moot controversy.

II. THE TRIAL COURT ERRONEOUSLY RULED THAT THE DEPARTMENT HAS A CLEAR DUTY TO AUTHORIZE FIREARMS PURCHASES EVEN BEFORE IT CAN COMPLETE A BACKGROUND CHECK.

"A writ of mandate may be issued by any court to an inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . ." (Code Civ. Proc., § 1085, subd. (a).) For a writ to issue, the Court must find a "clear, present, (and usually ministerial) duty" on the part of the respondent; and a "clear, present, and beneficial right" in the petitioner, to performance of that duty. (*Pacifica Firefighters*

Assoc. v. City of Pacifica (2022) 76 Cal.App.5th 758, 765.) "The trial court reviews an administrative action pursuant to Code of Civil Procedure section 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires." *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995.) "As a general matter, courts 'will be deferential to government agency interpretations of their own regulations, particularly when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate. (See *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 12-13.) Courts "will not disturb the agency's determination without a demonstration that it is clearly unreasonable." (*Ibid.*)

A. Under section 28220, the Department's obligation to conduct background checks for all firearms purchases is not limited by subdivision (f).

Section 28220 requires the Department to perform background checks of firearms applicants, through a search of authorized criminal, mental health, and other databases. (§ 28220, subd. (a).) Courts have held that the Department has a duty to complete its background checks. In *Braman v. State of California* (1994) 28 Cal.App.4th 344, the court considered former section 12076 (now § 28220, subd. (a)), which provided in pertinent part: "The department shall examine its records, as well as those records that it is authorized to request from the State Department of Mental Health pursuant to Section 8104 of

the Welfare and Institutions Code, in order to determine if the purchaser or transferee is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code." (*Id.* at p. 350.) The court held that the law creates a mandatory duty for the Department to conduct an investigation "and thus to prevent acquisition of a firearm by a former mental patient who then commits suicide with that weapon." (*Id.* at p. 347.) The Court reasoned: "The first paragraph of Penal Code section 12076's subdivision (c) now unambiguously specifies what records it is to examine: its own and those it is authorized to request from the Department of Mental Health. The Legislature's specification is preceded by the term 'shall,' which means that investigation is a mandatory obligation." (*Id.* at p. 351.)

Section 28220 imposes no explicit deadline for the Department to conduct the review that it describes in subdivision (a). Although California law provides for a mandatory 10-day waiting period, that is a minimum waiting period for acquisition by an approved purchaser, not a deadline for background checks. (See § 26815.) In *Silvester v. Harris, supra*, the Ninth Circuit recognized that the purpose of this mandatory waiting period is both to accommodate the length of time when a background check would normally be performed and also serve as a cooling off period. (843 F.3d at p. 823.) Although the waiting period provides time for the State to conduct background checks, there is no regulation, statute, or case authority that states that every background check must take place within the mandatory waiting

period. Indeed, by granting the Department up to 30 days to complete "delayed" transactions (under subdivision (f)(1)(A)), the Legislature plainly did not view the 10-day waiting period as an absolute barrier.

However, Petitioners' construction of the statute is that the 10-day mandatory waiting period that applies to firearms dealers should be read in harmony with section 28220, to imply an explicit waiting period of ten days to conduct a background check, and the Department lacks discretion to take longer than ten days to perform a background check unless one of the three enumerated reasons to delay up to 30 days under section 28220, subd. (f) is present. (AA-9.) This would lead to absurd results because in an emergency such as occurred in 2020, this approach would require that background checks not be performed. The Legislature added subdivision (f) to California's background check law to require the Department to delay firearms transactions up to 30 days where it comes across incomplete mental health, criminal, or firearms records. (2013 Cal. Legis. Serv. Ch. 737 (A.B. 500).) The provision states that the "department *shall* immediately notify the dealer to delay the transfer of a firearm to a purchaser if the records of the department, or the records available to the department" indicate any one of three different circumstances relevant to determining eligibility. (§ 28220, subd. (f)(1)(A).) The provision describes three foreseeable and routine contexts where background checks are not able to be completed in ten days and specifically authorizes DOJ to extend the background check up to 30 days in those

instances. (*Ibid.*) Petitioners' construction of subdivision (f)(1) negates the Department's duties to perform a background check where the Department needs more than ten days to search records for reasons the Legislature could not have predicted, and undermines the central purpose of section 28220, which is to require the Department to perform background checks and not approve sales until that can be accomplished.

The trial court treated the mandatory 10-day waiting period set forth in separate statutory provisions (sections 26815 and 27540) as not just a minimum waiting period for dealers to transfer a weapon, but as a maximum period for background checks. The trial court's reliance on the enumerated reasons in subdivision (f) as the only authorized reasons for going beyond 10 days to complete a background check gives no effect to the general requirement in section 28220, subdivision (a) that the Department perform background checks of firearms applicants, in the specific emergency circumstances that faced the Department in 2020.

In determining the meaning of a statute, the court's "fundamental task is 'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.'" (*Allen v. Sully Miller Contracting Co.* (2002) 28 Cal.4th 222, 227.) The court first must examine the statutory language and if possible, give the language its usual and ordinary meaning. (*Ibid.*) "If, however, the statutory language is ambiguous, a court "may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*Ibid.*) In undertaking this task, courts "do not consider

the statutory language in isolation"; rather they "look to the entire substance of the statute. . . . in order to determine the scope and the purpose of the provision." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 578, citations and internal quotations omitted.)

California law recognizes that "the law never requires impossibilities." (Civ. Code, § 3531.) This interpretive maxim aids courts in effecting "just application" of the law. (*National Shooting Sports Foundation v. State of California* (2018) 5 Cal.5th 428, 433.) The application applies when strict interpretation of a law would result in consequences contrary to the overriding intent of the statute. (*Ibid.*) As the Court explained in *Shooting Sports*, the maxim does not invalidate a statute but rather seeks to effectuate its underlying intent. (*Ibid.*) In accordance with the maxim, "the case law recognizes that a statute may contain an implied exception for noncompliance based on impossibility where such an exception reflects a proper understanding of the legislative intent behind the statute."(*Id.* at p. 434.) Courts "avoid any construction that would produce absurd consequences." (*Flannery v. Prentice*, *supra*, 26 Cal.4th at p. 578.)

The Ninth Circuit's review of a district court's handling of speedy trial issues during the pandemic is instructive. In *United States v. Olsen* (9th Cir. 2022) 21 F.4th 1036, 1047, the court held that there was no speedy trial violation where a trial had been continued while the court had closed due to the pandemic. The court held that the speedy trial act did not require that trial must

be *impossible*: "[S]urely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health." The Court interpreted the government's obligation to provide such a trial while considering operational context: "[P]roceeding with such trials would risk the health and safety of those involved, including prospective jurors, defendants, attorneys, and court personnel. The pandemic is an extraordinary circumstance and reasonable minds may differ in how best to respond to it." (*Id.* at p. 1049.)

Outside the COVID context, courts have found implied exceptions to statutory deadlines and obligations when necessary to effectuate the purpose of the statute. For example, notwithstanding the mandatory language in section 312 of the Code of Civil Procedure, which provides in part that "Civil actions, *without* exception, can only be commenced within the periods described in this title," courts have recognized limited, implied exceptions. (*Lewis v. Superior Court* (1985) 175 Cal.App.3d 366, 372.) In *Lewis*, the Court of Appeal construed the statute to allow for a late filing even though the circumstance (severe injury by the attorney days before the deadline) was not covered by any of the explicit statutory exceptions for late filings. (*Ibid.*)

And in *Sutro Heights Land Co. v. Merced Irr. Dist.* (1931) 211 Cal. 670, the Supreme Court considered a public water agency's statutory duty to solve a drainage issue created by its canals and found that although it had not "not succeeded in

discharging this duty to its fullest extent, it had done all that could reasonably be required of it with the money available for that purpose and which the resources of the district permit." (*Id.* at pp. 704-705.) The Court held that "[u]nder such a state of facts, the writ of mandate will not lie." (*Ibid.*) In reaching this determination, the Court considered the purpose of the statute and determined the Legislature could not have intended the public agency to work its own financial destruction in compliance with the explicit language of the statute. (*Id.* at p. 703.)

So too here. The Department navigated the same social distancing and personnel issues in the early days of the pandemic as other government and private entities, and did so while seeing its work double in March 2020 as firearms transactions surged. (AA-386 [Marlon Decl., Ex. B]; AA-169-171 [Thompson Decl., ¶¶ 26-38].) Despite this, the Department continued processing applications and did so efficiently, in compliance with its duty to conduct background checks under section 28220, subdivision (a). (*Ibid.*) In light of these unique challenges, the Court should apply the plain language of section 28220 to effect its central purpose that a background check be conducted prior to someone obtaining a firearm. Under the specific conditions the Department faced in this case, it did not abuse its discretion, act irrationally, or commit a violation of law when it took additional days to complete background checks that could not be completed within 10 days, rather than approving thousands of unchecked firearm transactions, some portion of which were for applicants prohibited from legally purchasing a firearm.

B. No evidence supports plaintiffs' claim that the Department has a policy of delay.

The trial court should also have declined to grant the request for a writ because petitioners never supported their claim that the Department "exploited the COVID-19 pandemic as an opportunity to unlawfully suspend—and thereby violate—the statutes and regulations requiring DOJ to conduct background checks within the first 10 days of a firearm transaction." (See Pet.'s Br. 1.) Nor did they support their claim that "DOJ conducted background checks when it got around to it, despite what the requirements of Penal Code § 28220 and 11 C.C.R. § 4230 say." (*Id.* at 2.)

The evidence shows otherwise. Statistics provided by the Department in discovery demonstrate that the Department took longer than ten days to conduct background checks during the height of the pandemic, but there was no conspiracy or policy to delay background checks. The numbers, instead, show that the Department's processing climbed significantly in 2020 even as the Department navigated severe challenges. (AA-386 [Martinez Decl., Ex. B].) These challenges included not only the pandemic and an extraordinary increase in workload, but also two days during which offices were closed due to social unrest (resulting in an inability to process background checks) at a time when firearms purchases increased even further. (*See* AA0170-171, AA-348-349; AA-388 [chart showing applications processed in 2020 compared to 2019].)

Petitioners' analysis of the discovery data (see AA-68, AA-59 [Pet.'s Br. at p. 8, FN 4]) likewise did not illustrate any

conspiracy to delay background checks. Even the numbers cited by Petitioners show that the average time to decision was under 13 days, which is just three days beyond the 10-day waiting period. (AA-59 [FN 4].) The numbers reinforce that Petitioners' and the trial court's interpretation of Department's statement on its website was wrong, because they show that even the most delayed background checks were completed by the eighteenth day (seven days after the conclusion of the 10-day mandatory waiting period) and delays were compelled by the emergency situation. (AA-171.)

Section 28220 states that the Department "shall" perform a background check but is silent on what should happen when a background check cannot be performed during the 10-day waiting period. Given its choices of not complying with its obligations and allowing firearm sales to proceed without background checks, or taking an average of three days more and complying with its obligations and correctly notifying dealers of the results, the Department complied with its obligations under the law when it chose the latter course. Taking this course meant that, the Department would perform background checks in compliance with California law. It also meant that firearms dealers would be accurately informed with the status of the background checks, rather than have unchecked applications misleadingly approved under regulations that do not appear to have anticipated such a situation. Most importantly, the Department ensured that persons prohibited under state or federal law from owning or possessing firearms were not able to obtain a firearm without a

background check. For the above reasons, the trial court should have found that the Department did not abuse its discretion, and should have denied the writ.

III. THE COURT'S GRANT OF DECLARATORY RELIEF WAS A LEGALLY ERRONEOUS ABUSE OF DISCRETION.

A. There was no active controversy or policy of delay to support issuing declaratory relief.

For all of the same reasons the trial court abused its discretion in issuing the writ, the trial court's granting of declaratory relief is also an abuse of discretion. As explained above, state law requires the Department to conduct background checks for *all* attempted purchases of firearms within the state, and the evidence below demonstrates that the Department did not have a policy of delaying background checks.

Moreover, declaratory relief is an equitable remedy that is available only "in cases of actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060; see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 ["The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject"].) "A difference of opinion does not give rise to a justiciable case until an actual concrete controversy arises." (*Wilson v. Transit Authority* (1962) 199 Cal.App.2d 716, 722.).

Here, for the same reasons discussed above, the record in the trial court established that there was no actual concrete controversy between the parties. True, a declaratory relief claim may remain justiciable where there is an ongoing dispute about a government practice, a reasonable expectation the policy would

be repeated in the future, and continuing public interest. See e.g. *Env't Def. Project of Sierra Cty. v. Cty of Sierra*, *supra*, 158 Cal.App.4th 877 [holding there was a live controversy within the meaning of § 1060 where the county believed streamlined zoning process complied with the law].) However, as discussed above, the issues involved in this case are unlikely to recur as the events involved in 2020 were unique, unprecedented, and are now over. (*See BKHN, Inc. v. Dept. of Health Servs.* (1992) 3 Cal.App.4th 301, 309-310 ["We find the instant matter likewise lacks the urgency and definiteness necessary to warrant declaratory relief[;]…the court would have to imagine a myriad of hypotheticals, speculate on the application of section 25363 to those hypotheticals, and conclude that under no circumstance would equitable principles warrant a finding of joint and several liability among the defendants]*; see also Pacific Legal Foundation v. Cal. Coastal Comm.* (1982) 33 Cal.3d 158, 171-172; *Brach v. Newsom*, *supra*, 38 F.4th 6.)

B. Courts may not issue declaratory relief in conjunction with writ relief.

The grant of declaratory relief was also legally erroneous for another reason: courts may not issue declaratory relief in conjunction with writ relief. Declaratory relief was not appropriate here because the ruling on the writ resolved all issues before the trial court, and because declaratory relief cannot be joined with a writ of mandamus.

The operative pleading here is a "Verified Petition for Writ of Mandate" that is also styled as a "Complaint for Declaratory, Injunctive, and Other Relief." (AA-6.) The trial court's final

judgment granted a writ that would direct the Department "to cease their policy and practice of delaying firearm transactions beyond the conclusion of the waiting period described in Penal Code sections 26815 and 27540 . . . absent a statutory basis to delay the transaction as permitted by Penal Code section 28220, subdivision (f)(1)(A)." (AA-413.) The trial court's final judgment also declared that the Department's "policy and practice of delaying firearm transactions beyond the conclusion of the waiting period described in Penal Code sections 26815 and 27540, absent a statutory basis to delay the transaction as permitted by Penal Code section 28220, subdivision (f)(1)(A), is unlawful." (AA-413.)

The writ and the declaration thus provide identical forms of relief. Where a court's ruling on a petition for a writ of mandate resolves all allegations central to the petitioner's claims, that ruling necessarily resolves the petitioner's demands for declaratory or injunctive relief. (See *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 699-700; *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973.) Here, the writ approved by the trial court was a directive to the Department that overlaps entirely with the declaratory relief approved by the trial court. The declaratory relief was thus wholly unnecessary.

In addition, "[i]t is settled that an action for declaratory relief is not appropriate to review an administrative decision." (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249; accord, *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223

Cal.App.4th 149, 154–155 [declaratory relief proper only to declare statute unconstitutional on face, and not as applied to plaintiff by an administrative agency].) "Declaratory relief . . . cannot be joined with a writ of mandate reviewing an administrative determination." (*City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1466–1467 [citing *Guilbert v. Regents of University of California* (1979) 93 Cal.App.3d 233, 244]). "It is therefore not material . . . that declaratory relief is *otherwise* available generally as a vehicle for interpreting statutes." *Ibid.* The same is true of a petition for traditional mandamus under Code of Civil Procedure section 1085, such as the kind Plaintiffs filed here. "[I]n light of the black letter prohibition . . . against conjoining declaratory relief with a writ proceeding," it does not matter whether a petitioner seeks a writ of traditional mandamus or administrative mandamus—declaratory relief cannot issue in conjunction with writ relief. (*Id.*, at fn 9.) Plaintiffs' decision to seek a writ as a means of correcting agency action means that the trial court's determination to grant declaratory relief was legally erroneous.

CONCLUSION

For the above reasons, the Court should vacate the judgment below.

Respectfully submitted,

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March 14, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S OPENING BRIEF uses a 13 point Century Schoolbook and contains 12,266 words.

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March 14, 2023

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **Mauro Campos, et al. v. Xavier Becerra, et al.**
No.: **D081134**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On March 14, 2023, I electronically served the attached **APPELLANT'S OPENING BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 14, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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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 March 14, 2023, at Sacramento, California.

Eileen A. Ennis
Declarant


Signature

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