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 REPLY BRIEF

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INTRODUCTION

The background check delays that occurred in this case were specific to spring and summer 2020. During that time, like many other public entities, the Department of Justice faced significant challenges due to COVID-19. These challenges, along with a surge in firearms sales and closures due to social unrest, temporarily impeded its ability to complete some background checks within the 10-day firearms waiting period, yet the Department resolved all delays before this lawsuit was filed. The trial court erred in failing to dismiss the petition on these undisputed facts and in entering judgment for Petitioners. That judgment should be reversed.

As a threshold matter, this case was rendered moot before it was filed, and no exception to mootness applies. As the Petitioners acknowledge, the Department long ago resolved the backlogs for firearm background checks during the COVID-19 public emergency—conditions that are unlikely to recur. And the trial court's determination that the Department had a policy of taking 30 days to conduct a background check "for any reason" was clearly erroneous and not supported by the record. Accordingly, the trial court's judgment stems from a purported policy that the Department never followed and the judgment therefore provides no effective relief.

Moreover, for much the same reason, it was error to grant the writ relief requested in this moot case. A writ of mandate was not necessary to bring the Department into compliance with the law. Since before the Petitioners filed this lawsuit, the

Department has conducted all background checks within 10 days, or delayed the checks under the explicit delay provisions within Penal Code section 28220. No writ was necessary to provide the Petitioners any effective benefit. Likewise, in the absence of an existing controversy, declaratory relief was also inappropriate. Petitioners effectively ask for an advisory opinion, applicable only in some future hypothetical situation.

And on the merits, the judgment is contrary to the explicit mandate in the Penal Code that the Department check the eligibility of all firearm purchasers to own and possess firearms. Petitioners failed to show that the Department abused its discretion when it took longer than 10 days to perform all firearms background checks during three months of the COVID-19 pandemic and did not approve unchecked applications at 10 days. The statute does not authorize or require the Department to skip this review if circumstances prevent it from completing a background check within the statutory 10-day waiting period, nor does the statute authorize or require the Department to approve an unchecked application. Accordingly, the Department reasonably acted within its discretion by complying with the statute's explicit instructions to perform a background check, where impossibility prevented it from conducting checks within the 10-day period. To do otherwise would have resulted in the Department authorizing transactions to prohibited persons to the detriment of public safety.

The trial court erred when it granted the writ and issued judgment in this moot case, and the Department respectfully requests that this Court reverse the judgment.

ARGUMENT

I. THE UNDISPUTED EVIDENCE SHOWS THAT PLAINTIFFS' CLAIMS ARE MOOT AND NO EXCEPTION APPLIES.

This case is moot. The delays in this case were entirely tied to the confluence of events that occurred during March 2020 through July 2020: the COVID-19 pandemic, mandated social distancing, an abnormal surge in firearms sales, and a two-day office closure due to social unrest, which coincided with even more precipitous peaks in gun sales. (AA-169-173.) The Department worked through the transactions and by July 2020—before Petitioners filed this lawsuit—had caught up. Neither before this three-month time period, nor after, has the Department conducted its initial section 28220, subdivision (a), review outside of the 10-day waiting period. (AA-172-173 [¶¶45-46].)

"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* (2023) 106 Cal.App.4th 204, 214.) There are limited exceptions to mootness. "A court may resolve an otherwise moot case if it raises an important issue likely to recur, but which regularly evades timely review." (*White v. Davis* (2003) 30 Cal.4th 528, 537.) Courts may also consider a question raised in a moot case where the case "poses an issue of broad public interest that is likely to recur…" (*Id.* at pp. 214-25.)

In its Minute Order, the trial court denied the Department's request to find the case moot, specifically pointing to the Department's statement on its website notifying the public of the delays affecting firearm transactions. (AA-415.) The court, construing the statement to be a policy to take 30 days to conduct all firearms transactions "for any reason," found that

> [R]espondents 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. The record indicates the challenged policy remained publicly posted as recent as May 26, 2022, and petitioners assert it continues to remain live on the website.

AA-415. And in this appeal, Petitioners continue to argue that this case is not moot because "the superior court's order prevents DOJ from exercising its putative reserved power to delay transactions in *any situation*, not just in Covid." (RB at p. 27.) But the Department has never claimed that it has the power to delay transactions for any reason in any situation. Its position has been that section 28220, subdivision (a), requires it to perform a background check, that this check should be done efficiently and during California's 10-day firearms waiting period, and that during one isolated time period, from April 2020 until July 2020—the early months of the COVID-19 pandemic in California—it could not complete this task for all transactions

due to unforeseen circumstances.[1] (AA-167; AA 103.) The trial court clearly erred in adopting Petitioners' interpretation, because, as discussed more infra, on pp. 17-20, it is based on a misreading of Department policy, and contrary to all of the other evidence submitted in the case. As the evidence showed, the COVID-19 pandemic and its attendant consequences made it impossible to conduct all background checks within 10 days from April 2020 through July 2020. (AA-170-172; AA-386.) After that date, however, the Department has been able to return to its normal practice of conducting background checks within the firearms waiting period, unless further investigation is required under section 28220, subdivision (f)(1)(A), making this dispute moot. (AA-172 [¶¶45-46].)

None of the authority cited by Petitioners is to the contrary. For example, the reasons for not finding the controversy moot in *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099 do not apply here. The court in *Newsom* held that the question of whether the challenged governor's executive order was a constitutionally permissible executive response to the state of emergency was not moot, because this question was a "matter of great public concern regarding the Governor's orders in the ongoing COVID-19 pandemic emergency." (*Id.* at p. 1105.) This was because not only was the emergency ongoing, as the Court of Appeal noted, but the trial court cited "50 different executive

[1] This policy recognizes that the background check for some transactions will extend beyond 10 days, up to 30 days, to allow for further investigation. (§ 28220, subd. (f)(4).)

orders changing numerous California statutes [issued] since the state of emergency was declared….” (*Id.* at p. 1108.) Here, unlike the circumstances apparent in *Newsom*, where the contested order was but one of several dozen orders raising the same legal question that pertained to the same ongoing emergency, this case raises one question. And the COVID-19 delays having been resolved, there is no ongoing application except for in some speculative future emergency.

Petitioners also unavailingly rely on *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, which is distinguishable because it involved zoning decisions that are exceedingly likely to reappear in similar future cases. *Environmental Defense Project* involved a county’s “streamlined zoning process,” which the county ha[d] made clear it [would] continue with . . . in the future.” (*Id.* at p. 886.) County zoning decisions are routine, reoccurring events. The specific circumstances that brought on the delays in background checks in this case were not routine and are exceedingly unlikely to recur.[2]

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[2] The other cases cited by Petitioners likewise involve disputes regarding procedures that apply to routine and recurring government matters. *Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, involved policy regarding public comment periods for council meetings. Council meetings occurred weekly and were therefore a frequently recurring event. Likewise, *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 913, concerned a city council’s ongoing practice of discussing topics in closed sessions that went beyond the matters for which the close session had been called.

(continued…)

The pandemic-related cases that Petitioners cite are also distinguishable. (See RB at p. 35, fn 9.) *County of Los Angeles Department of Public Health v. Superior Court* (2021) 61 Cal.App.5th 478 also involved COVID-19 orders that were likely to be reinstated. The county in that case made it clear that it would reinstate the challenged order if there was another surge in COVID-19 cases. (*Id.* at p. 487.) This was far from a remote possibility in late 2020 and early 2021, when the case was decided. In *Flores v. Garland* (9th Cir. 2021) 3 F.4th 1145, the court also found that the dispute was not moot. However, in that case, the federal government never contended that the controversy was moot, and stated that it intended to engage in the disputed practice "either during the current pandemic or a future public health emergency, if such practice were permitted." (*Id.* at p. 1150.) The fact that it intended to engage in the challenged policy during the current pandemic distinguishes *Flores* from this case.

Here, the Department faced a once-in-a-lifetime confluence of events, making the cases cited by the Department in its Opening Brief, *Brach v. Newsom* (9th Cir. 2022) 38 F.4th 6 (en banc) and *Cerletti v. Newsom* (2021) 71 Cal.App.5th 760, closely analogous to this case. For the reasons stated in *Brach*, it is exceedingly unlikely that the Department will again face the

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California Alliance for Utility Safety and Education v. City of San Diego (1997) 56 Cal.App.4th 1024, 1030, also concerned a city's violation of closed meeting rules.

same operational difficulties that it faced during the COVID pandemic. Petitioners assert that this case is not moot because the Department has not "'unequivocally renounced' its intention to delay transactions if it is unable to complete background checks for reasons not enumerated in Section 28220(f)." (RB at p. 34.) But as the Ninth Circuit stated in *Brach*, the State need not "meet the virtually unattainable goal" of guaranteeing that it will never engage in the challenged conduct again. (*Brach*, 38 F.4th at p. 9.) Just as in *Brach,* where California was not required to guarantee that it would never again close schools, "even in the face of yet another unexpected emergency or contingency," the Department here should not be required to permit the release of a firearm to a person without a background check after 10 days notwithstanding any other exigency that might be apparent.

Cerletti v. Newsom, *supra*, involving one-time COVID payments to undocumented Californians, also provides relevant authority for finding this case moot. Just as the plaintiffs in *Cerletti* could not "explain how time can be rewound and the funds recaptured," Petitioners here do not explain how time can be rewound to authorize the release of firearms to non-background checked individuals at 10 days. (See *Cerletti*, *supra*, 71 Cal.App.5th at p. 766.)

No exceptions to mootness applied because this dispute was entirely tied to a unique confluence of events related to COVID. (AOB at pp. 20-24.) They are not likely to recur. And if they did recur, they would not evade review. The same petitioners that

sued here could file a writ petition and an emergency motion to allow the Courts to determine how to proceed in light of the situation presented at the time. While Petitioners assert that this case raises a pure question of law, the relief they seek cannot be divorced from the circumstances giving rise to their claims. Petitioners acknowledge that circumstances such as "an earthquake or computer hacking ma[king] it impossible to conduct background checks based on damage to the DROS computer database" would raise a different issue. (AA-0399). Where facts make a difference in the controversy, the issue is not fit for judicial resolution. (*Wilson & Wilson v. City of Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1583 [holding moot issue was not fit for resolution where it court was required to speculate on the resolution of an entirely hypothetical situation].) If delays ever recurred in the future, it would be in the public interest for a court to apply the statute to circumstances present *at that time*, rather than to tie the hands of the State based on an advisory opinion issued in a moot case. [3]

Here, even under the legal theory presented by the Petitioner, the Department was in compliance with all laws by the time this lawsuit was filed. Neither a writ of mandate nor declaratory relief were appropriate in this case because by the

[3] The Legislature is considering a bill that would allow the Attorney General to notify dealers to delay the transfer of a firearm to a purchaser up to 30 days in an emergency where the emergency has caused the Department to be unable to obtain or review records to determine the purchaser's eligibility. (See Assemb. Bill No. 1406 (2023-2024 Reg. Sess.).)

time the trial court issued its judgment, there was no act left for the court to order, and no actual controversy remained. A writ of mandate is appropriate "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, sub. (a).) Likewise, declaratory relief requires "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.) "The 'actual controversy' language in Code of Civil Procedure section 1060 encompasses a *probable* future controversy relating to the rights and duties of the parties." (*Wilson*, 191 Cal.App.4th at p. 1582 [citing *Environmental Defense Project of Sierra*, 158 Cal.App.4th at p. 855].) No writ of mandate or other relief was required to bring it into compliance and there was no probable future controversy. Because the events giving rise to this case concluded long ago, and are unlikely to arise in the same circumstances in the future, the trial court fundamentally erred in finding that Petitioners' claims were not moot.

II. THE TRIAL COURT ERRED IN ISSUING A WRIT TO STOP A PURPORTED POLICY THAT THE DEPARTMENT NEVER ADOPTED.

In its Opening Brief, the Department describes the unprecedented impact on firearms background checks that occurred during the beginning of the COVID-19 pandemic in California. (AOB at pp. 18-20.) In March 2020, after the Governor and President declared states of emergency, firearms sales

increased dramatically. (See AA-386.) The number of applications for firearms submitted to the Department were double and sometimes triple the number of applications the Department would have expected based on numbers from the prior year. (AA-170.) Before the pandemic hit, the Bureau received around 2,000 new applications per day. (*Id.*) In contrast, on March 17, 18, and 19, as the pandemic expanded, the Bureau received over 9,000 applications each day. (*Id.*) The Department automatically screened applications and approved 14% without further review but the balance of applications had to be analyzed by a person. (AA-166-167). The Department could not have realistically anticipated the overnight increase in workflow. (AA-169-170.) Not only were there many more applications to analyze, but analysts also had to contend with several other issues, such as employees initially taking leave due to COVID-19, two days of workplace closure due to social unrest in June, and delays contacting the courts for records. (AA-170.) These factors, which Petitioner significantly downplays, cumulatively made it impossible for the Department to conduct background checks on all firearms applications within 10 days. (AA-169-172.) There is no showing in this case that the Department did not adequately plan for an expected level of firearms sales or for foreseeable contingencies or unexpected temporary surges. This was an entirely different and unprecedented scenario, akin to a natural disaster or other emergency.

The Department continued to check records and do so as fast as it could. To conduct background checks within the 10-day

waiting period, the Department implemented all feasible measures. (AA-171-172 [¶¶39-45].) Other than when the Governor closed state offices due to social unrest for two days in June (AA-171), analysts came into the office to continue conducting background checks (AA-171-172.) In order to check them quickly, the Department also imposed mandatory overtime and reassigned capable employees to the unit responsible for conducting firearm purchase background checks. (AA-171-172 [¶¶39-45].) It also encouraged more voluntary overtime and expedited training and hiring efforts.[4] (*Id*.)

Petitioners make much of the fact that the Department did not authorize analysts who checked backgrounds to work from home. (RB at p. 47.) But no evidence suggests that sending employees home to work would have increased productivity or allowed the Department to conduct background checks within 10 days. Nor does this support Petitioners' claim that the Department did not consider background check work to be a "critical departmental function." This argument has no force because the Department never shut down the background check unit. The unit continued to report and even significantly increased its productivity. (AA-171-172; AA-388 [Daily Applications Processed 2019-2020].) The Department determined

[4] The Department prioritized training and hiring during this time (AA-172 [¶42]), but it takes approximately a year to hire, background check, and train an analyst (AA-354-355). Accordingly, new analysts were a long-term solution, not an answer to the delays in April, May or June 2020.

that Analysts were not able to telework because of the mandated turnaround times for DROSs. (AA-172, ¶ 43.) That management determined that some programs (involving significant database use, access to voluminous personal identifying information including criminal records and mental health records, and fast turnaround times) should continue to report to duty at their physical work location is not an admission that the Department viewed that work as less important or less urgent. The Court should infer the opposite.

During this time, the Department announced on its website that its employees "continue to perform the statutorily required background checks" and that "circumstances may compel that background checks are completed after the expiration of the 10-day waiting period," but that the Department would "complete these checks in the shortest time possible." (AA-124.) In July 2020, when the Department was again able to conduct its checks within the 10-day waiting period, it processed over 200% more background checks than it had processed in July the prior year. (AA-388.)

By the time Petitioners filed their petition for writ of mandate in August 2020, the Department was again conducting its review of records within the 10-day waiting period. (AA-172 [¶¶45-46].) There were no more delays; no writ was necessary to approve any firearms applications or to change the way that the Department was processing incoming applications. Petitioners argued, however, that the statement on the Department's website kept the dispute alive. The website announcement's purpose was

to notify dealers and buyers about the now-concluded delays in background checks, but Petitioners wrongly characterize the announcement as a policy of taking up to 30 days to perform background checks "for any reason (or no reason at all)." (AA-58; see RB at p. 18). The trial court also adopted this interpretation (RT at p. 13). But this misconstrues the plain wording of the notice; the Department never had this policy. (AA-167; AA 103 "[I]t is and was DOJ's policy to process applications within 10 days."].) The policy was for analysts to review the applications within the statutory waiting period, unless further investigation was required under subdivision (f)(1)(A) of section 28220. (AA-167 [¶ 16].) To find that the Department had a policy to take 30 days was clear error.

Petitioners' and the trial court's reading of the Department's statement focuses on the first sentence, while neglecting the rest of the paragraph. The website notice, in full, stated:

> 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.) When Petitioners read the first sentence, "Under Penal Code section 28220(f)(4), the Department has up to 30 days to complete background checks on purchasers of firearms and ammunition," they apparently infer an intent by the Department to convey the unspoken words "in every case, for any reason." As the italicized portions above show, rather than announcing a policy of taking 30 days for any reason to conduct background checks, the Department was actually notifying firearms dealers and purchasers that despite the pandemic, social upheaval and shutdowns that were occurring at that time, "DOJ employees continue to perform the statutorily required background checks." (*Ibid.*) And the notice emphasized that although "circumstances *may compel* that background checks are completed after the expiration of the 10-day waiting period," the Department would "complete these checks in the *shortest time possible*." (*Ibid.*)

The facts presented at the trial court showed the Department took its obligation seriously, maintained staffing, accelerated reviews, and did everything it practicably could, to check records within the 10-day waiting period. (AA-171-172 [¶¶39-45].) Petitioners offered no evidence to the contrary. The Department presented evidence showing that during the relevant time period, Department employees processed an ever-increasing number of background checks. In March 2020, the Department received over 140,000 firearms applications, whereas in March

2019, approximately 85,000 (AA-386.) That month, the Department manually processed 103,000 applications (compared to 69,000 in March 2019). (AA-388.) From March 2020 through the end of the year, the numbers of applications received and processed were substantially higher than what they had been the previous year. (AA-386 & 388.) Department employees diligently worked through these abnormally high numbers of firearm purchase applications in the shortest time possible.

Nowhere did the Department claim to have the authority to take 30 days in every case. But the trial court adopted this interpretation:

> The Writ is granted….The law is what it is. And my understanding is the only thing that this prevents is for the Department to emasculate the 10-day waiting period by saying it's now up to 30 days in every case.

(RT 13.) The trial court erred when it adopted Petitioners' interpretation of the statement, because the evidence overwhelmingly showed that the Department had no policy of taking 30 days for any reason and was responding to an emergency situation. (RT 7-8 [explaining at hearing that Department was responding to an emergency situation].) The evidence showed that (consistent with the other language in the statement), the Department was *compelled* to take longer than 10 days to conduct the checks. That is, for three months in 2020, it was impossible for the Department to comply with section 28220, subdivision (a), within 10 days.

Thus, the trial court did not resolve a material question warranting writ relief. The judgment resolves no actual

controversy by mandating a ministerial duty that is not already being performed; instead, it takes aim at a strawman. And in issuing a purely advisory opinion to invalidate a purely fictional policy, it causes the public potential harm during a real emergency: if there is ever an earthquake, a hacking or other event outside the control of the Department, which keeps the Department from checking records within 10 days, the judgment would require the Department to allow the transactions to proceed, contrary to the directions of the Legislature.

III. THE DEPARTMENT DID NOT ABUSE ITS DISCRETION WHEN IT TOOK LONGER THAN 10 DAYS TO COMPLY WITH SECTION 28220, SUBDIVISION (A) IN THE MIDST OF A WORLDWIDE PANDEMIC.

As to the merits, the trial court erred in determining that the Petitioners proved the Department abused its discretion in taking more than 10 days to conduct a background check. Section 28220 requires that the Department check records, its own and others it is authorized to request. (§ 28220, subd. (a).) Without explanation, Petitioner dismisses in a footnote the cases the Department cited to show its obligation to conduct an adequate background check. (See RB p. 38-39, f. 11.) But consistent with this line of authority, the statute itself explicitly states that the Department "shall" conduct a background check.

Petitioners offer no authority defying this clear legislative intent that background checks be conducted. And contrary to the Petitioner's assertions, the Department's interpretation of the statute does not nullify any of its provisions. (See RB at p. 40.) Petitioners' argument disregards section 28220's requirement that the Department "shall examine its records, as well as those

it is authorized to request from the State Department of State Hospitals…in order to determine if the purchaser is [prohibited under California] or federal law from possessing, receiving, owning, or purchasing a firearm" (§ 28220, subd. (a)). The "delay" provision under subdivision (f)(1)(A) would generally apply *after* this examination has occurred. Subdivision (f)(1)(A) states that "[t]he department shall immediately notify the dealer to delay the transfer of the firearm to the purchaser *if the records of the department or the records available to the department* in the National Instant Criminal Background Check system, indicate" one of three possible prohibitions. The delay provision recognizes that in some cases the Department's examination of records to which it already has access under subdivision (a) sometimes does not allow for a final determination of the applicant's eligibility. In those cases, the Department may take up to 30 days to make a determination and is not required or allowed to make a decision based on incomplete records. (§ 28220, subd (f)(1)(A) & (4).)

A different set of circumstances existed here. The Department found it temporarily impossible to conduct its initial review of records as required by subdivision (a) within 10 days. Aware of its statutory duty to conduct background checks, it acted reasonably to continue processing background checks as quickly as possible.

The legislative history for Assembly Bill 500, which added the delay provisions in subdivision (f) in 2013, supports the Department's actions. The Senate Public Safety Committee report, makes clear that Penal Code section 28220, subdivision (f)

addresses a situation that sometimes occurs after the initial records check is conducted to meet the requirements of subdivision (a). The provision addressed the need to "take up to 30 days to complete the background check in those cases in which a preliminary record check shows that the purchaser has previously been taken into custody and placed in a facility for mental health treatment…or has been arrested for a crime and DOJ is unable to ascertain within the normal 10-day waiting period the final disposition for the arrest or detention…" (S. Comm. on Public Safety, Analysis of Assem. Bill 500 (2013-2014 Reg. Sess.), as amended May 24, 2013, p. 12.) In these cases—where the initial check under subdivision (a) has already taken place but has been inconclusive—the Department has up to 30 days to make a determination.

The legislative history also suggested that prior to the amendment, "[i]n a small number of cases, usually because disposition documents are unavailable, [the Department] has not been authorizing delivery of the firearm by the dealer" within the 10 day wait period. (*Ibid.* [citing California Chapters of Brady Campaign to Prevent Gun Violence].) This suggests that subdivision (f)(4) clarified that this was permissible, put a 30-day limit on the practice, and created notification obligations for the Department when it took longer than 10 days. What the amendment did not do was specify that the background check under subdivision (a) must be conducted within 10 days or not conducted at all. Nothing in Section 28220 says that a

background check must take place within 10 days, or not take place at all.

Petitioners' position is that nothing short of literal and absolute impossibility could excuse the Department's inability to conduct a background check within the 10-day waiting period. But impossibility is not so stringent of a concept. Even the 10-day waiting period itself, which Petitioners use to impute a time limit on the Department, is a limit on the *dealer's* ability to transfer the firearm. (See § 26815, subd. (a).)

Petitioners fail in their attempt to distinguish *United States v. Olsen* (9th Cir. 2022) 21 F.4th 1036, which held that the COVID pandemic fell within the "ends of justice" exception under the Speedy Trial Act. (*Id.* at p. 1047 ["But surely 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"].) Section 28220, like the Speedy Trial Act, contains similar flexibility: nowhere does the Penal Code state that after 10 days, the Department must authorize an unchecked firearm transaction, just as neither the Speedy Trial Act nor the Sixth Amendment requires that a trial be literally impossible. The Courts of Appeal have likewise found the COVID-19 pandemic to be sufficient cause for long trial delays, despite the Sixth Amendment's right to a speedy trial. (See *Elias v. Superior Court* (2022) 78 Cal.App.5th 926, 941.) In one such case, this Court considered a fifteen month delay mostly attributed to COVID-19 quarantine orders, found it significant

that "the backlog here was not a routine or chronic condition for the court" and that "the COVID-19 pandemic has been a unique nonrecurring event which has produced an inordinate number of cases for court disposition." (*Ibid.*, citations omitted.) In construing the speedy trial right, the circumstances creating the delay were relevant, even if they did not make holding a trial literally impossible.

Applying Petitioners' argument in the unique circumstances presented here would have triggered significant regulatory concerns. If the Department had allowed firearms dealers to transfer non-background checked firearms, it would have had to authorize the sales through the existing regulatory framework in the Dealer Entry System (DES). But that would have required the Department to improperly describe the status of the unchecked firearms applications. According to the regulations, "an 'Approved' status shall be designated for a Department-approved application after the 10-day waiting period has concluded." (Cal. Code Regs. tit. § 4230, subd. (b)(1)(A).) Use of this status, or the similar status "approval after delay," would have falsely conveyed to firearms dealers and buyers that the person has been background checked, when they had not been. Marking the application as "undetermined" would also have misled firearms dealers as to the status of the application. "Undetermined" is to be used "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).) Although firearms dealers are authorized by California law to release a firearm to a person whose background check is "undetermined," the Department is aware that some firearms dealers choose not to do so. (*See Regina v. State* (2023) 89 Cal.App.5th 386 [lawsuit against Department by person whose transaction was canceled by firearms dealer after Department indicated the buy was "undetermined"].) Marking unchecked background checks as "undetermined" could have resulted in the non-release of firearms that days later could have been background checked and marked as "approved." Authorizing firearms to be sold without a background check could also have resulted in the transfer of a firearm to a clearly prohibited individual, who would have otherwise been determined ineligible just a few days later through a records check. Transferring a firearm to such an individual could have permanent and devastating effects through the loss of innocent lives.

In resolving these issues in a way that met its multiple responsibilities, just as courts, schools, and other government agencies grappled with their competing obligations during the pandemic, the Department did not abuse its discretion when it opted to follow the Penal Code's explicit instructions to check records (§ 28820, subd. (a)) and do so as quickly as it practicably could. To do otherwise would have violated the explicit instructions of the statute that records be checked and would have required the Department to inaccurately report its determinations to firearms dealers and buyers. All of the

evidence in this case shows that the Department was attempting to abide by the statute. This was not an abuse of discretion, and the Court erred when it granted the petition for a writ of mandate in this case.

IV. THE JUDGMENT ISSUED IS NOT IN THE PUBLIC INTEREST BECAUSE IT IS DETRIMENTAL TO PUBLIC SAFETY.

It is not in the public interest for a court to issue a judgment, in a moot case, that will require the state to allow firearms transactions to proceed without a background check, when California law requires records to be checked before a person may purchase a firearm.

Here, the Petitioners beat down a strawman: the Department's alleged policy that it could take 30 days to conduct a background check for any reason. As explained above, the Department does not have any such policy, and as it made clear through the evidence it presented in this case, its staff worked tirelessly to conduct the records checks required by California law within 10 days and never took 30 days to conduct the checks. Petitioners and the trial court read the Department's statement on its website as a policy to take 30 days, but the record makes clear that the Department never had such as a policy. The policy was to try to conduct background checks within 10 days, but when that was not possible, to conduct them as quickly as possible.

The judgment in this case would apply widely, in circumstances where the Department finds it literally and completely impossible to conduct a background check within 10 days. If there is an earthquake or a hacking event that brings

down the Department's databases for several days, the Department would arguably be in violation of the judgment if it does not allow dealers to transfer firearms after 10 days. Neither the statute, nor the Department's regulations specifically require this. As the Department argued in its Opening Brief, California law recognizes that the "law never requires impossibilities," (AOB at p. 50; Civ. Code § 3531). Petitioners distinguish between the facts in this case, which it contends were just "administrative burden," and "literal impossibility." (RB at p. 46 [admitting that a cyberterrorism attack disabling the Department's computer system might suffice to be "literal impossibility."].) But the Department faced more than mere administrative burden, and found that it was impossible for it to complete its statutory obligation to perform some background checks within 10 days. (AOB at p. 37.) But even if one agreed with Petitioners' extreme position that the types of facts shown by the Department could not establish impossibility, the judgment makes no distinction between these types of facts and those presented by what the Petitioner calls "literal impossibility," such as computer failure after a cyberattack. The judgment in this case reflects a decision by the trial court that when it comes to state firearm background checks, the law *does* require impossibilities, even though the applicable statute does not evince any Legislative intent to override this basic principle of California law.

Petitioners have asserted that the Department's statistics show that the vast majority of background checks are approved, such that the number of sales to prohibited people that would be

authorized by default, without a background check, would be small. (See RB at p. 20.) However, Petitioners discount the obvious role background checks play in preventing prohibited persons from attempting to buy firearms. If a prohibited person knows their attempt to purchase a firearm will result in a denial and a report to local law enforcement (§ 28220, subd. (c)), they are unlikely to attempt the purchase at all. In contrast, if a prohibited person is aware that a window has opened where that person may purchase firearms without a background check, the background check process no longer is an impediment to obtaining a firearm. A door unlocks for any prohibited person to obtain a firearm, and the risk to the public, and law enforcement, which would eventually be tasked with seizing the illegally purchased firearms, could be severe and long-lasting.

CONCLUSION

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

Respectfully submitted,

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July 27, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S REPLY BRIEF uses a 13 point Century Schoolbook and contains 6,234 words.

ROB BONTA
Attorney General of California

/S/ MEGAN A.S. RICHARDS
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July 27, 2023

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 July 27, 2023, I electronically served the attached **APPELLANT'S REPLY 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 July 27, 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 July 27, 2023, at Sacramento, California.

Eileen A. Ennis
Declarant

Eileen A. Ennis
Signature

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