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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HARRY SHARP; DAVID AJIROGI;
RYAN GILARDY; DARIN PRINCE;
TODD FELTMAN; DAVID KUEH;
TERRY JAHRAUS; THE CALGUNS
FOUNDATION; FIREARMS POLICY
COALITION; FIREARMS POLICY
FOUNDATION; SECOND
AMENDMENT FOUNDATION; and
MADISON SOCIETY FOUNDATION,

Plaintiffs and
Petitioners,

v.

XAVIER BECERRA, in his official
capacity as Attorney General of
California; BRENT E. ORICK, in his
official capacity as Acting Chief of the
Department of Justice Bureau of
Firearms; JOE DOMINIC, in his official
capacity as Chief of the Department of
Justice California Justice Information
Services Division; CALIFORNIA
DEPARTMENT OF JUSTICE; and
DOES 1 through 20, inclusive,

Respondents.

No. 2:18-cv-02317-MCE-AC

MEMORANDUM AND ORDER

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1 Through the present lawsuit, Plaintiffs, who are a combination of both individual
2 firearm owners and gun rights interest groups, challenge the alleged shortcomings of the
3 online program administered in 2017-2018 by the California Department of Justice and
4 its officials (hereinafter collectively “Defendants”) for registering “bullet button” firearms
5 on behalf of gun owners possessing those weapons before they became illegal following
6 a 2016 amendment to California’s Roberti-Roos Assault Weapons Control Act (“ACWA”).
7 Plaintiffs allege they were subject to constitutional due process violations in the way that
8 Defendants’ program was handled. Plaintiffs’ Complaint was originally filed in state court
9 before being removed to this Court on August 24, 2018 under federal question
10 jurisdiction pursuant to 28 U.S.C. § 1331.

11 Now before the Court is Defendants’ Motion to Dismiss Plaintiffs’ operative
12 Second Amended Complaint (“SAC”), which, for the reasons outlined below, is
13 DENIED.¹

14 15 **BACKGROUND**

16
17 The California Legislature passed ACWA in 1989 in response to a growing
18 number of shootings involving semiautomatic weapons, including an incident occurring
19 at the Cleveland Elementary School in Stockton where five children were killed. See
20 Silveira v. Lockyer, 312 F.3d 1052, 1057 (9th Cir. 2002) (citing 1989 Cal. Stat. ch. 19,
21 § 3 at 64, codified at former Cal. Penal Code § 12275, et seq.). ACWA, as initially
22 constituted, prohibited assault weapons by make and model. Because gun
23 manufacturers responded by making “copycat” weapons that were substantially similar
24 to the restricted weapons, and differed in only insubstantial respects, in 1999 the
25 Legislature amended ACWA to define the class of restricted weapons by features, as
26 opposed to simple restrictions on certain models. Id. at 1058. Those amendments

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¹ Having determined that oral argument would not be of material assistance, the Court submitted this matter on the briefs in accordance with E.D. Local Rule 230(g).

1 refined the definition of prohibited guns by providing that a weapon constituted a
2 restricted assault weapon if it had the capacity to accept a detachable magazine in
3 addition to one of several specified military characteristics. See S.B. 880, 2015-2016
4 Reg. Sess., Assembly Comm on Pub. Safety, June 13, 2017, p. 4. This amendment was
5 intended to close the loophole created by assault weapons being defined only by make
6 and model. See id.

7 In 2016, the Legislature amended ACWA yet again, this time in response to a
8 minor design change made by gun manufacturers that allowed shooters to use the tip of
9 a bullet as a “tool” to push a button that would release the ammunition magazine. Id.
10 at 5. With the so-called “bullet button,” a detachable ammunition magazine could be
11 removed and replaced in seconds, rendering meaningless any distinction in California
12 law between a magazine that is not “detachable” and one that can be readily without the
13 use of a special tool. As was noted in the course of the 2016 amendment process,
14 weapons with “bullet buttons” are the functional equivalents of illegal assault weapons in
15 every respect, except that the shooter uses a bullet, magnet, or other instrument, instead
16 of his or her finger, to depress the button that releases the weapon’s magazine. As a
17 proponent of gun safety noted, “[t]hese weapons may be reloaded as quickly as
18 prohibited assault weapons, [and] have been permitted to flood into the state at an
19 alarming rate, threatening Californians’ safety.” Id. at 8. As such, the 2016
20 amendments to ACWA prohibited semiautomatic rifles as those without a “fixed”
21 magazine, with a “fixed” magazine defined as an “ammunition feeding device contained
22 in, or permanently attached to, a firearm in such a manner that the device cannot be
23 removed without disassembly of the firearm action.” Cal. Penal Code § 30515(b).

24 ACWA, as both originally enacted and as subsequently amended, included a so-
25 called “grandfather” clause permitting anyone to retain an assault weapon lawfully
26 possessed prior to being made unlawful, so long as the weapons were registered by
27 their owners with the California Department of Justice. Id. at §§ 30680, 30900. With
28 particular reference to the bullet-button assault weapons targeted by the 2016

1 amendments, if an individual lawfully possessed such weapons before January 1, 2017,
2 that person could continue to possess them provided the weapons were registered by
3 July 1, 2018, in the Department of Justice’s “California Firearms Application Reporting
4 System (“CFARS”). Cal. Penal Code §§ 30680, 3099(b)(1).

5 CFARS went live in August of 2017, providing nearly a year-long window within
6 which individuals could register, through the internet, assault weapons prohibited by the
7 2017 amendment to ACWA. SAC, ¶ 36. Plaintiffs allege, however, that Defendants’
8 online registration system was riddled with problems from the very onset and was both
9 underfunded and understaffed. Frequent glitches and computer crashes made weapons
10 registration difficult. According to the SAC, as of February 2018, some five months into
11 the registration period, there was a backlog of some 4,653 uncompleted applications.
12 By June 30, 2018, when the registration period ended, that backlog had increased some
13 ten-fold to 52,443. See SAC, ¶¶ 39-42.²

14 The individual Plaintiffs, for the most part, attempted to register their weapons
15 during the last couple of days of the registration period. They claim they were assured
16 that despite systems issues their applications could nonetheless be completed through
17 additional attempts. Some Plaintiffs describe repeated unsuccessful attempts, however,
18 before the registration period simply phased out. In the meantime, because the DOJ
19 refused to extend the period, this lawsuit was filed on July 11, 2018.

20 While Plaintiffs allege four causes of action, each is grounded on alleged due
21 process violations stemming from the claim that Defendants’ website was “flawed,
22 intermittently inoperable, and ultimately incapable of providing a reliable means for the
23 public to register their firearms in accordance with the law.” SAC, ¶ 3. According to
24 Plaintiffs, because they cannot legally own their weapons now that the registration
25 period has passed, their property rights have been abridged. Perhaps even more

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27 ² While Defendants’ Reply appears to assert that “nearly 70,000” applications were successfully
28 processed, its reliance on ¶ 42 for that proposition appears incorrect. While ¶ 42 does state that 68,848
applications were submitted, it goes on to state that of those applications only 13,519 weapons were
actually registered.

1 importantly, Plaintiffs aver that this alleged deprivation of due process subjects them to
2 criminal sanctions should they persist in possessing the prohibited weapons. Finally,
3 from a procedural standpoint, Plaintiffs allege the program was woefully inadequate.

4 Defendants, on the other hand, claim that Plaintiff' property rights have not been
5 abridged because individual gun owners can either modify their weapons or sell them in
6 another state. The State further claims that Plaintiff gun owners were themselves
7 responsible for failing to register by waiting until the eve of the deadline to attempt to do
8 so.

10 STANDARD

11
12 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
13 Procedure 12(b)(6), all allegations of material fact must be accepted as true and
14 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.
15 Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and plain
16 statement of the claim showing that the pleader is entitled to relief' in order to 'give the
17 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell
18 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
19 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require
20 detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of
21 his entitlement to relief requires more than labels and conclusions, and a formulaic
22 recitation of the elements of a cause of action will not do." Id. (internal citations and
23 quotations omitted). A court is not required to accept as true a "legal conclusion
24 couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
25 Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief
26 above the speculative level." Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright &
27 Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the
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1 pleading must contain something more than “a statement of facts that merely creates a
2 suspicion [of] a legally cognizable right of action”).

3 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
4 assertion, of entitlement to relief.” Twombly, 550 U.S. at 555 n.3 (internal citations and
5 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard
6 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of
7 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing Wright &
8 Miller, supra, at 94, 95). A pleading must contain “only enough facts to state a claim to
9 relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . . have not nudged their
10 claims across the line from conceivable to plausible, their complaint must be dismissed.”
11 Id. However, “[a] well-pleaded complaint may proceed even if it strikes a savvy judge
12 that actual proof of those facts is improbable, and ‘that a recovery is very remote and
13 unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

14 A court granting a motion to dismiss a complaint must then decide whether to
15 grant leave to amend. Leave to amend should be “freely given” where there is no
16 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
17 to the opposing party by virtue of allowance of the amendment, [or] futility of the
18 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
19 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
20 be considered when deciding whether to grant leave to amend). Not all of these factors
21 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
22 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
23 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
24 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,
25 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,
26 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.
27 1989) (“Leave need not be granted where the amendment of the complaint . . .
28 constitutes an exercise in futility . . .”).

ANALYSIS

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3 In now moving to dismiss, Defendants first claim that because any misfeasance in
4 operating the online CFARS registration system was only negligent, as opposed to
5 deliberate in nature, no substantive due process claim can be made. Defendants point
6 to the Supreme Court's decision in Daniels v. Williams, 474 U.S. 327 (1986), which holds
7 that due process violations require allegations of "deliberate decisions of government
8 officials to deprive a person of life, liberty, or property." Id. at 331 (emphasis in original).
9 The Ninth Circuit has also found that averments of deliberate indifference are necessary
10 to advance a substantive due process claim. See Castro v. City of Los Angeles,
11 833 F.3d 1060, 1067-68 (en banc). Due process is deemed to entail "a stringent
12 standard of fault, requiring proof that [an] actor disregarded a known or obvious
13 consequence of his action." Bryan Cty. v. Brown, 520 U.S. 397, 410 (1997).
14 Consequently, "a culpable mental state" is required. Patel v. Kent School Dist., 648 F.3d
15 965, 974 (9th Cir. 2011). Mere negligence does not suffice. Johnson v. Barker, 799
16 F.2d 1396, 1401 (9th Cir. 1986).

17 While Defendants insist that the circumstances of this matter fall within the
18 Supreme Court's holding in Daniels, this Court disagrees. Daniels involved a simple
19 claim based on "mere lack of care" where a jail deputy had left a pillow on a stairway that
20 caused the inmate to slip and hurt himself. Daniels, 474 U.S. at 328, 332, 334. This
21 case, on the other hand, is premised on alleged governmental neglect that ran through
22 an entire executive department charged with administering a statewide online program
23 that ran the course of almost an entire year. Given the ten-fold increase in incomplete
24 applications between February and June of 2018, as well as the SAC's allegations that
25 Defendants consequently knew or should have known that the CFARS registration
26 system "was substantially understaffed and incapable of timely accepting and processing
27 the registration applications" (SAC, ¶ 39), Plaintiffs have adequately pled deliberate
28 indifference inasmuch as Defendants arguably "disregarded a known or obvious

1 consequence” of the way they handled the registrations. Bryan Cty., 520 U.S. at 410.
2 Significant too in making this conclusion is Plaintiffs’ allegation that Defendants were not
3 only fully aware of the system’s problems but also failed to rectify them despite pleas
4 from the public, including individual Plaintiffs. See SAC, ¶¶ 44-46, 48-49, 41-52.

5 Moreover, while Defendants appear to blame the individual Plaintiffs for waiting
6 until the last minute to attempt to register their firearms (seven waited until the last two
7 days of the online registration period), the fact that Defendants’ website used a dramatic
8 “countdown clock” showing the number of weeks, days, hours, minutes and seconds
9 elapsing until the deadline at least arguably supported a belief that registrations could be
10 both processed and accepted “until literally the last second of the registration period.”
11 Id. at ¶ 38. Particularly when coupled with the documented systemic failures outlined
12 above, the countdown clock also supports an inference of deliberate indifference.

13 Importantly, Defendants’ own policies can support a finding of deliberate
14 indifference. Under the so-called “customs-or-practices” form of deliberate indifference,
15 the requisite indifference can be established where Plaintiffs “(1) . . . were deprived of
16 their constitutional rights by defendants and their employees acting under color of state
17 law; (2) that the defendants have customs or policies which ‘amount[] to deliberate
18 indifference’ to their constitutional rights; and (3) that these policies are the ‘moving force
19 behind the constitutional violation[s].” Lee v. City of Los Angeles, 250 F.3d 668, 681-82
20 (9th Cir. 2001) (quoting City of Canton v. Harris, 489 U.S. 378, 389-91 (1989). Here, as
21 indicated above, Plaintiffs allege not only the ten-fold increase in incomplete applications
22 and failure to respond to entreaties for help, but also the fact that the registration
23 program was understaffed and underfunded from its very inception. SAC, ¶¶ 39-40.

24 Based on all of the above, the Court concludes that Plaintiffs have stated a
25 sufficient substantive due process claim to survive Defendants’ Motion to Dismiss. While
26 Plaintiffs’ causes of action predicated on due process violations survive on that basis
27 alone, the Court notes that Defendants’ separate challenges concerning the viability of
28 any procedural due process violation also fail. That argument is based on the premise

1 that because the online registration process gave Plaintiffs ample notice, time and ability
2 to comply and register their assault weapons, and because Plaintiffs waited until the last
3 days of the nearly year-long registration window to register, any harm they suffered as
4 due to their own delay as opposed to any due process violation.

5 To determine what procedural due process is constitutionally due under the Fifth
6 or Fourteenth Amendments to the United States Constitution, courts primarily look to
7 whether two elements have been established: “(1) a protectible liberty or property
8 interest; and (2) a denial of adequate procedural protections.” Thornton v. City of St.
9 Helens, 425 F.3d 1148, 1164 (9th Cir. 2005). Due process in this context “is a flexible
10 concept that varies with the particular situation.” Shinault v. Hawks, 782 F.3d 1053,
11 1057 (9th Cir. 2015). The fundamental requirement is that the person to be deprived of
12 a property interest “be given an opportunity to be heard at a meaningful time and in a
13 meaningful manner.” Buckingham v. Sec’y of U.S. Dep’t of Agric., 603 F.3d 1078, 1082
14 (9th Cir. 2010).

15 Here, Defendants allege that any risk to Plaintiffs’ property interest is “minimal” in
16 the first place because Plaintiffs can “(1) sell the assault weapon either out of the state or
17 to a licensed gun dealer within the State (Cal. Penal Code § 31055); (2) modify the
18 assault weapon to make it compliant with state law; or (3) store the assault weapon
19 outside of the state.” Defs.’ Mot. to Dism., ECF No. 14-1, 10:23-25. This argument
20 borders on the nonsensical. The fact that Plaintiffs can dispossess themselves of their
21 unregistered firearms does not obviate the loss of their own right to lawfully possess and
22 use their firearms without the threat of criminal sanctions attaching to prohibited
23 unregistered weapons.

24 Defendants’ second argument, that the implementation of the CFARS online
25 registration system provided adequate procedural protection in any event, is no more
26 availing. Defendants claim that “[w]aiting until the last days of a nearly year-long
27 registration window to register. . . is not the basis of a due process violation,” with any
28 injury Plaintiffs sustained as a result being “of their own making.” Id. at 11:15-16, 28.

1 The Court disagrees. Plaintiffs allege that Defendants failed and refused “to establish
2 and maintain a consistently reliable online system for processing all the necessary
3 registration[s] during the fixed application period.” Pls.’ Opp., ECF No. 17, 12:7-8.
4 Moreover, as indicated above, the fact that Defendants’ registration system used a
5 “countdown clock” delineating the weeks, days, hours and seconds within which
6 registration could be completed at least arguably supports an inference that Plaintiffs
7 could successfully process an application even during the registration period’s final
8 moments. The fact that this was not the case is sufficient to defeat a motion to dismiss
9 alleging that adequate procedural safeguards were employed.


10 Finally, for purposes of procedural due process, it is also important to note that
11 unlike substantive due process there is no requirement that liability turn upon the
12 culpability of the offending party. In Logan v. Zimmerman Brush Co., 455 U.S. 422
13 (1982), the Supreme Court specifically recognized that a violation of procedural due
14 process occurs when “it is the state system itself that destroys a complainant’s property
15 interest, by operation of law,” whether the state’s action “is taken through negligence,
16 maliciousness or otherwise.” Id. at 436. Consequently, Defendants’ argument that there
17 is no due process violation because its shortcomings were, at most, negligent does not
18 defeat a procedural due process claim.

19
20 **CONCLUSION**

21
22 For all the above reasons, Defendants’ Motion to Dismiss (ECF No. 14) is
23 DENIED.

24 IT IS SO ORDERED.

25 Dated: June 25, 2019

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27 
28 MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE