Case No. C081994

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

ALVIN DOE AND PAUL A. GLADDEN,

Plaintiffs and Appellants,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, AND MARTHA SUPERNOR, IN HER OFFICIAL CAPACITY AS ACTING CHIEF OF THE CALIFORNIA DEPARTMENT OF JUSTICE BUREAU OF FIREARMS,

Defendants and Respondents.

Appeal from the Superior Court for the County of Sacramento
Case No. 34-2014-00163821
Hon. David I. Brown

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Appellants are not aware of any entities or persons that must be listed under California Rules of Court, rule 8.208(e)(2).

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants brought this action when the California Department of Justice ("DOJ") reversed its longstanding interpretation of a narrow Penal Code exemption on handgun purchases. DOJ did not roll out this new interpretation and application of the law—which is plainly a "regulation" under the Administrative Procedure Act—so that all of the affected parties could comment and participate in a process administered by the Office of Administrative Law. Instead, DOJ's Bureau of Firearms issued a one-and-a-half page letter.

DOJ's original position was correct. Its new position cannot be squared with the applicable statutory language.

California Penal Code section 27535 ("Section 27535") generally prohibits a person from applying to purchase multiple handguns in any thirty-day period. Penal Code § 27535(a). The statute exempts several types of organizations and classes of people from the one-handgun-per-thirty-day limit, however. The exemption at the heart of this lawsuit provides that Section 27535's "one in 30" prohibition does not apply to "[a]ny person" who is both (a) licensed under federal law as a collector of "curios and relics" and (b) possesses a current certificate of eligibility to possess and purchase firearms issued by the DOJ. *Id.*, § 27535(b)(9). The exemption turns on the status of the "person," not the type of

firearm being purchased. Consistent with this text, DOJ had long exempted eligible collectors from the "one in 30" rule for the purchase of any type of handgun.

In May 2014, the DOJ Bureau of Firearms notified the state's firearms dealers that it had adopted a new enforcement policy. DOJ said it was now interpreting the licensed collectors' exemption to apply only to purchases of curios or relics. The letter directed dealers to cancel and refuse to process any transactions in which persons falling within the Section 27535(b)(9) exemption proposed to purchase a handgun *other than* a curio or relic. It also notified dealers that DOJ would cancel transactions that did not conform to this new policy.

The new enforcement policy is void because it alters the scope of the statute by narrowing the express coverage of the exemption. DOJ does not have the authority to alter or amend a statute, or enlarge or impair its scope through statements of enforcement policy. *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967). The Superior Court's contrary conclusion at summary judgment was incorrect and should be reversed.

Alternatively, even if DOJ's new enforcement policy represents a *permissible* interpretation of Section 27535, the policy must still be struck down as an invalid underground regulation. DOJ admits it did not comply with the Administrative Procedure Act's minimum

procedural requirements before its adoption. Instead, it argued below that the new policy applied the "only legally tenable" interpretation of the statute—despite its contrary interpretation in the past—so the APA did not apply. Gov. Code § 11340.9(f). Remarkably, the Superior Court accepted this position—despite needing several pages to explain why DOJ's reversal from its prior position was permissible. But the very fact that DOJ had for years held a contrary view of the law demonstrates that the new application of the exemption is not "rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language"—and therefore was not the "only legally tenable" application of the exemption. *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 336–37 (2006)

Thus, if the Court decides that DOJ's new interpretation of the exemption is permissible, it should at least void the new policy as an underground regulation. *Morning Star Co.*, 38 Cal. 4th at 332–36 (2006); Gov. Code § 11342.2. Indeed, this action probably could have been avoided if the new regulation were subjected to the administrative process, which was designed, at least in part, to vet whether a new regulation comports with the law.

FACTUAL AND PROCEDURAL HISTORY

I. Penal Code Section 27535 Exempts Federally Registered Collectors From The General Prohibition On Purchasing More Than One Handgun Of Any Type In A Thirty-Day Period.

Section 27535(a) of the Penal Code provides that "[n]o person shall make an application to purchase more than one handgun within any 30-day period." California is one of only three states in the country that imposes such a limitation,[1] and Federal law imposes no similar prohibition.[2] The first two violations of Section 27535 are infractions punishable by fines of $50 and $100; subsequent violations constitute misdemeanors. Penal Code § 27590(e).

Subdivision (b) of the statute lists thirteen exemptions from the

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[1] The three states are California, Maryland (Md. Code Ann., Pub. Safety § 5-128), and New Jersey (N.J. Stat. Ann. § 2C:58-2(a)(7)). ike California, New Jersey's statute (enacted in 2009) contains a blanket exemption for licensed collectors. N.J. Stat. Ann. § 2C:58-2(a)(7)(b); *see also* Senate Law and Public Safety and Veterans' Affairs Committee Statement to Assem., No. 339, L. 2009, ch. 104 ("Also exempt from the one-gun-a-month limitation are collectors of firearms as curios or relics as defined in Title 18, United States Code, section 921 (a)(13) who have in their possession a valid Collector of Curios and Relics License issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives."), *available at* http://www.njleg.state.nj.us/2008/Bills/A0500/339_S2.PDF.

[2] Federal law does, however, require firearms dealers to report the purchase of multiple handguns within a single five-day period. 18 U.S.C. 923(g)(3)(A); 27 C.F.R. § 478.126a.

one-handgun-per-thirty-day limitation. As relevant here, it states that the limitation in "[s]ubdivision (a) shall not apply to" "[a]ny person who is licensed as a collector pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code[3] and the regulations issued pursuant thereto, and has a current certificate of eligibility issued by the Department of Justice." Penal Code § 27535(b)(9) (the "Federally-Licensed Collector's Exemption"). The Federally-Licensed Collector's Exemption is thus available only to individuals who have been vetted by both the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") and the DOJ.

This vetting is significant. A certificate of eligibility ("COE") issued by the DOJ confirms a person's eligibility to lawfully possess and/or purchase firearms under state law. Penal Code § 26710; Cal.

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[3] 18 U.S.C. §§ 921, *et seq.*, the Gun Control Act of 1968, defines "collector" as "any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define." Federal regulations define "[c]urios or relics" as "[f]irearms which are of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons." 27 C.F.R. § 478.11. This includes "[f]irearms which were manufactured at least 50 years prior to the current date," "[f]irearms which are certified by the curator of a municipal, State, or Federal museum which exhibits firearms to be curios or relics of museum interest," and "[a]ny other firearms which derive a substantial part of their monetary value from the fact that they are novel, rare, bizarre, or because of their association with some historical figure, period, or event." *Id.*

Code Regs. tit. 11, § 4031(g) ("'Certificate of Eligibility' means a certificate which states that the DOJ has checked its records and determined that the applicant is not prohibited from acquiring or possessing firearms . . . at the time the check was performed."). COE applicants must answer questions regarding their criminal record and mental illness history, and provide personal information (including fingerprints) to the DOJ, which then runs a background check to ensure an applicant is not prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm. Cal. Code Regs. tit. 11, § 4037.

A federal collector's license allows the licensee to purchase, transport, and transfer curios and relics in interstate commerce. *See* 27 C.F.R. § 478.41(c), (d); 27 C.F.R. § 478.93. Before being issued a collector's license, applicants are subject to a comprehensive background check by the BAFTE, and licensed collectors are subject to ongoing BATFE oversight, which includes reporting, recordkeeping, and inventory inspection requirements. 18 U.S.C. § 923 (g)(1)(C), (D) (providing for annual inspection of collector's inventory and records); (g)(2) (licensed collector must maintain "records of the receipt, sale, or other disposition of firearms"); *see also* U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Application for Federal*

Firearms License (Collector of Curios and Relics), online at http://bit.ly/2iFIKR6.

II. Since At Least 2005, DOJ Interpreted The Federally-Licensed Collector's Exemption To Apply To The Purchase Of Any Type Of Handgun.

The Legislature enacted the "one-in-30" rule in 1999 as part of Assembly Bill 202. Assem. Bill 202 (1999-2000 Reg. Sess.) (enacting Penal Code § 12072[4]). In August 2005, Dr. Ken Lunde, a federally-licensed collector who held a COE, contacted the Bureau of Firearms to clarify the scope of the Federally-Licensed Collectors' Exemption. (Clerk's Transcript "CT" 211.) He explained that "California DOJ staff" had told him that the exemption "applies only to [curio and relic] handguns," but that "as the Penal Code is currently written, it is clear that the exemption stated in terms of describing characteristics of the *person* effecting the transfer, . . . and not about the characteristics of the handgun that is being transferred." (*Id.*)

In September 2005, Lunde received a response from Alison Merilees, then the "Deputy Attorney General assigned to the [DOJ's] Firearms Division." (CT 213.) She explained that, in fact, DOJ's "long-

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[4] Section 12072 was renumbered as Section 27535 in a nonsubstantive reorganization of the Penal Code sections governing deadly weapons. Sen. Bill 1080 (2009-2010 Reg. Sess.).

standing policy" was to construe the Federally-Licensed Collector's Exemption to *all* firearms purchases. (CT 216.) Specifically, she wrote:

> I have been advised that it is our long-standing policy for DOJ to exempt all firearms purchases by [curio and relic] licensees from the provisions of [Penal Code section] 12072(a)(9)(A) [the "one gun per month" limit], even if the firearms are not curios and relics.

Id. (first brackets added; second brackets in original).

DOJ offered no evidence below that this policy was ever modified until May 2014.

III. DOJ Announced A New Enforcement Policy That Now Limits The Federally-Licensed Collector's Exemption To Only The Purchase Of Curio And Relic Handguns.

On May 8, 2014 the DOJ's Bureau of Firearms sent a letter notifying licensed firearms dealers in the state of a new enforcement policy interpreting Section 27535(b)(9)'s Federally-Licensed Collector's Exemption to apply only if the purchaser applies to purchase a handgun that is a curio or relic:

> It has come to the attention of the California Department of Justice, Bureau of Firearms that dealers are selling handguns that are not defined as curio and relics under federal law to persons holding the license and certificate described in Penal Code section 27535, subdivision (b)(9) under this exemption. By doing so, these dealers are allowing the buyers to purchase multiple, non curio and relic handguns at one time, which violates both state and federal law.

(CT 223–24, May 8, 2014 Information Letter re Penal Code section

27535, Subdivision (a) – Proper Use.)

The letter quoted the federal regulations concerning the scope of a the collector's license, 27 C.F.R. § 478.94 (the "Collectors' Regulation"), and stated:

> Based on this regulation, it is clear that federal law does not permit the licensee to use the curio and relic license in transactions other than those involving curio and relic firearms, nor grants them any other special status over a non-licensee when the transaction involves non-curio and relic firearms. These provisions of federal law are specifically referenced in Penal Code section 27535, subdivision (b)(9).

(CT 224.) Thus, DOJ offered exactly two paragraphs of analysis, and a quotation of the Collectors' Regulation, as a basis for reversing course. The letter concluded:

> [T]he exemption provided in Penal Code section 27535, subdivision (b)(9), shall not be used for the sale of any handguns other than those defined as curio and relics under federal law, and any such transaction shall be discontinued immediately. Any transactions violating California or federal law that are not canceled by the dealer will be canceled by the California Department of Justice, Bureau of Firearms.

Id. DOJ did not submit this new policy position to the notice and comment rulemaking process. (CT 219, Stipulated Undisputed Material Fact 5.)

IV. Procedural Background.

Appellants are federally-licensed collectors and have current certificates of eligibility issued by the DOJ. (CT 233, Declaration of Alvin Doe ISO MSJ ("Alvin Decl."),[5] ¶ 2.) Under DOJ's prior application of the Federally-Licensed Collector's Exemption, they would be exempt from the one-handgun-per-thirty-day limit imposed by Section 27535(a). However, the DOJ has enforced, and threatens to enforce, its new interpretation of Section 27535 in a manner that prevents Appellants from lawfully purchasing firearms under the Federally-Licensed Collector's Exemption provided by Section 27535(b)(9).

On prior occasions, appellant Alvin Doe applied to purchase multiple non-curio or relic handguns within a thirty-day period and was allowed to complete those purchases based on the Federally-Licensed Collector's Exemption. (CT 233, Alvin Decl., ¶ 3.) On April 24, 2014, Doe applied to purchase multiple non-curio or relic handguns from a licensed firearms dealer in Orange County. (*Id.*, ¶ 5.) On or about May 1, 2014, the DOJ cancelled all but one of the applications

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[5] Plaintiff Alvin Doe proceeds under a fictitious name to protect his or her privacy due to fear of criminal prosecution and retaliation based on the activities described in the complaint. *Doe v. Lincoln Unified Sch. Dist.*, 188 Cal. App. 4th 758, 765-67 (2010). (CT 233, Alvin Decl., ¶ 6.)

based on the New Policy. (*Id.*) But for the fear of prosecution or threat of adverse action by the DOJ, Doe would submit additional applications to purchase non-curio or relic handguns that would violate the DOJ's new policy. (CT 233, Alvin Decl., ¶ 6.)

Appellants filed this lawsuit on May 20, 2014, alleging two causes of action for declaratory relief, specifically, that (1) the New Policy is void because it is inconsistent with Section 27535, and (2) the New Policy is void because DOJ adopted it without complying with the Administrative Procedure Act.

Appellants filed a motion for preliminary injunction in June 2014, CT 21–72, which the trial court denied in July 2014, CT 131–138.

In response to arguments made by the State in the preliminary injunction, Appellants served discovery directed at the DOJ's prior policy interpreting the Federally-Licensed Collectors' Exemption. (*See* CT 449–450, Supp. Decl. of Stephen M. Duvernay in Support of Plaintiffs' Mot. for Summary Judgment or Adjudication.) Specifically, they asked the State to confirm that the policy set forth in the 2005 Merrilees e-mail—which is identical to the position Appellants assert in this case—accurately stated its policy until it issued the New Policy. (CT 470–474, Defendant's Responses to Request for Admission.) DOJ refused to provide a substantive response, claiming that Appellants'

claims presented "pure issue[s] of law." (*Id.*)

On January 11, 2016, the parties filed cross-motions for summary judgment or summary adjudication. (*See* CT 153–239, Appellants' moving papers; CT 240–293, Appellees' moving papers.)

On February 19, 2016, the Court issued an order granting the State's motion and denying Plaintiffs' motion. (CT 517–525.)

On March 2, 2016, the Court entered a judgment of dismissal, CT 526–528, and Plaintiffs filed this appeal on May 4, 2016, CT 534–535.

STANDARD OF REVIEW

An appellate court applies a de novo standard, and "review[s] summary judgment appeals by applying the same three-step analysis applied by the trial court: First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, *if the movant has met its burden*, we consider whether the opposition raised triable issues of fact." *Hawkins v. Wilton*, 144 Cal. App. 4th 936, 939–40 (2006) (emphasis in original).

ARGUMENT

The State did not dispute below that the new enforcement policy announced in May 2014 constitutes a "regulation" under the Administrative Procedure Act, Gov. Code section 11340 et seq. (the "APA"), and it plainly is one as shown below. Thus, for the remainder of this brief, we refer to the new enforcement policy as the "New Regulation." The State argued that the APA does not apply here because the New Regulation constitutes the "only legally tenable interpretation" of the exemption. *Id.* § 11340.9(f). This despite the fact that the New Regulation constitutes a complete reversal of DOJ's long-held prior interpretation of the statute.

DOJ's original interpretation of the law was correct, and its new interpretation is not. If, however, the Court decides the law is at least *susceptible* to DOJ's new interpretation, the Court should acknowledge that the New Regulation is an underground regulation, and strike it down on that basis.

I. The New Regulation Is Void Because It Is Inconsistent With And Alters The Scope Of Section 27535's Exemption.

The New Regulation is void because it alters the scope of Section 27535. Specifically, it diminishes the scope of Section 27535(b)(9)'s exemption. "[A]n agency does not have discretion to promulgate

regulations that are inconsistent with the governing statute, alter or amend the statute, or enlarge its scope." *Cal. Sch. Bds. Ass'n v. State Bd. of Educ.*, 191 Cal. App. 4th 530, 544 (2010). And "[w]here regulations are void because of inconsistency or conflict with the governing statute, a court has a duty to strike them down." *Id.*; *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967) ("regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations").

A. The New Regulation Is Inconsistent With The Plain Meaning Of Section 27535.

The "first step" in a case involving a dispute over the meaning of a statute "is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." *Goodman v. Lozano*, 47 Cal. 4th 1327, 1332 (2010) (internal quotation marks and citations omitted). The Court "may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." *Cal. Fed. Savings & Loan Ass'n v. City of Los Angeles*, 11 Cal. 4th 342, 349 (1995).

The New Regulation applies the exemption in a manner that is contrary to the plain language of Section 27535(b)(9), which takes eligible collectors outside of Section 27535(a)'s prohibition on the purchase of more than one handgun of any type in a 30-day period. Subsection (a)'s one-purchase-every-thirty-days limitation applies to all types of handguns, and subsection (b)(9) says that the limitation simply "shall not apply."

The exemption is not limited in any way. It does not restrict the licensed collectors' exemption to transactions involving curios or relics. And, since subsection (a)'s limit does not apply, there is no other California law preventing appellants and persons similarly situated from purchasing more than one handgun in a thirty-day period. Because "there is no ambiguity in the language of the statute," "the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." *Lennane v. Franchise Tax Bd.*, 9 Cal. 4th 263, 268 (1994); *People v. Traylor*, 46 Cal. 4th 1205, 1212 (2009). The Legislature rationally concluded that individuals who have undergone the background checks and vetting necessary to obtain and keep a collectors' license and a COE are worthy of an exemption.

DOJ's new policy marks a complete reversal of its prior interpretation of the exemption. In 2005, six years after the creation of

the exemption, the DOJ's position on the matter was settled enough that it was considered the "long-standing policy" of the DOJ that the licensed collectors' exemption applied to "all firearms purchases . . ., even if the firearms are not curios and relics." (CT 216, 225 (the "Merrilees E-mail").) In the course of that e-mail exchange, the DOJ repudiated precisely the same logic it now advances as a formal policy: That the exemption does not apply because the federal firearms license only applies to transactions involving curios and relics. (*See* CT 207–217, Declaration of Ken Lunde, ¶¶ 3–6 & Exs. 1–3.).

Yet the State never confronted the Merrilees E-mail or explained its prior policy below. In fact, Appellants sought discovery into the State's prior policy, but it stonewalled—claiming that the interpretation of the statute presented "pure issues of law." (CT 449–475.) The only inference that should be drawn from the State's silence is that the Merrilees E-mail accurately stated the BOF's official policy at that time. Appellants requested an evidentiary inference against the State in their summary judgment briefing, CT 425–26,[6] but the trial

[6] *See* Evid. Code. §§ 412 & 413; *Breland v. Traylor Eng'g & Mfg. Co.*, 52 Cal. App. 2d 415, 426 (1942) ("A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured.").

court did not address this issue in its ruling.[7]

B. The Federally-Licensed Collector's Exemption Turns On The License Itself, Not On The Scope Of The Federal Privileges Afforded In The License.

The Federally-Licensed Collector's Exemption in Section 27535(b)(9) applies to "[*a*]*ny person* who is licensed as a collector" under federal law and who also has a current COE under state law. Penal Code § 27535(b)(9) (emphasis added). The exemption applies to the "person" who satisfies the particular status (possession of a federally-issued license and a state-issued COE).

The New Regulation cited only a federal regulation concerning the scope of the federal collector's license as a reason for its change of policy. *See* CT 223–24 (citing 27 C.F.R. § 478.94). Likewise, the Superior Court found it significant that the federal regulation defining the scope of the federal collector's license states "that '[t]he collector

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[7] It is an open question whether a trial court's evidentiary rulings made in connection a summary judgment ruling are reviewed under a de novo or abuse of discretion standard. *Reid v. Google, Inc.*, 50 Cal. 4th 512, 535 (2010) (expressly leaving open "whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"); *see also, e.g.*, *Howard Entm't, Inc. v. Kudrow*, 208 Cal. App. 4th 1102, 1113 (2012) (noting issue and citing *Reid*). At least one court of appeal has concluded, based on *Reid*, that a de novo standard of review applies to evidentiary rulings that turn on questions of law. *Pipitone v. Williams*, 244 Cal. App. 4th 1437, 1451 (2016).

license . . . shall apply only to transactions related to a collector's activity in acquiring, holding or disposing of curios and relics.'" (CT 511–512 (quoting 27 C.F.R. § 478.41(d).) It reasoned that the exemption's "specific reference to the federal statute" "recognizes that [curio and relic] licenses relate to the purchase of curios and relics, [not] mass manufactured modern handguns." (CT 512.) Accordingly, the court held, "the exemption from the 1-in-30 rule as a result of having a [curio and relic] license extends only to curios and relics." (*Id.*)

The Superior Court and the State ignore that eligibility for the *state*-law exemption turns simply on an individual's *status* as a *federally*-licensed collector (and their qualification for a COE). This is not a question of federal pre-emption, where the federal government purports to clarify how both federal and state regulation shall proceed. Rather, the California Legislature chose to exempt "persons" who hold the federal collector's license and a COE.

And there would be no reason for the federal regulations to spell out that a collector license authorizes the federal licensee to do anything under state law. Indeed, the federal regulation cited by the Superior Court, 27 C.F.R. § 478.41(d), is concerned only with clarifying that a federal collectors' license does not permit a licensee to act as "a manufacturer, importer, or dealer" of firearms without being separately

licensed to do so by the BAFTE. Likewise, the nearby language in 27 C.F.R. § 478.41(c) confirms that the federal "privileges" of a licensed collector "entitle the licensee to transport, ship, receive, and acquire curios and relics in interstate or foreign commerce, and to make disposition of curios and relics in interstate or foreign commerce, to any other [licensed] person . . . for the period stated on the license." In short, the scope of the federal license under federal law does not define the scope of the state exemption here, which turns simply on the existence of the federal license itself.[8]

[8] The Superior Court's decision in this regard compounds the DOJ's erroneous interpretation of federal law. In the letter, DOJ states that "dealers are allowing [licensed collectors] to purchase multiple, non curio and relic handguns at one time, which violates both statute and federal law." (CT 223.) Not so. Federal law does not prohibit responsible, law-abiding citizens—whether or not they possess a collectors' license—from purchasing multiple handguns, and citizens are free to do so in the 47 states that do not impose monthly limits. (Federal law does, however, require firearms dealers to report the purchase of multiple handguns within a single five-day period. 18 U.S.C. 923(g)(3)(A); 27 C.F.R. § 478.126a. It is also worth noting that DOJ's interpretation of federal law is entitled to no deference. *See Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014) (a state agency's interpretation is not entitled to deference in interpreting statutes that it is not charged with enforcing); *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495–96 (9th Cir. 1997) (same).

C. If The Legislature Intended The Exemption To Apply Only To Purchases Of Curio And Relic Firearms, It Would Have Said So—As It Has Done Elsewhere.

If the Legislature had intended to limit the scope of the Federally-Licensed Collector Exemption to only the purchase of curio and relic firearms, it could have easily done so. Instead, it chose to apply the exemption to the "person" holding the license.

In analogous contexts, the Legislature has expressly limited the scope of licensed-collector exemptions to transactions involving only curios and relics. *See, e.g.*, Penal Code §§ 26970 (ten-day waiting period does not apply to "sale, delivery, loan, or transfer" of a curio or relic to a "licensed collector [who] has a current certificate of eligibility"); 31700 (exempting from the firearm safety certificate requirement "a federally licensed collector who is acquiring or being loaned a handgun that is a curio or relic, . . . who has a current certificate of eligibility . . ."); 27966 (requirement that transactions be processed through a licensed dealer does not apply if the firearm is a curio or relic, and "the person receiving the firearm is a licensed collector" who "has a current certificate of eligibility").

The New Regulation is thus at odds with the "well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another,

it should not be implied where excluded." *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 725 (1989). In short, if the Legislature had intended the Federally-Licensed Collector's Exemption to only apply to purchases of curios or relics, it would have said so.

D. Legislative History Confirms That The Licensed Collectors' Exemption Applies To The Purchase Of Any Handgun.

While "[t]he absence of ambiguity in the statutory language dispenses with the need to review the legislative history," resort to extrinsic aids is appropriate to confirm that a plain language construction is consistent with legislative intent. *People v. Albillar*, 51 Cal. 4th 47, 56, 67 (2010); *accord Klein v. United States*, 50 Cal. 4th 68, 82 (2010). The legislative history of Section 27535 confirms that a licensed collector is exempt from the one-handgun limit without respect to whether the collector is purchasing a new handgun or a curio or relic.

Section 27535 was enacted by the Legislature in 1999 as part of Assembly Bill 202. The committee analyses of AB 202 state that licensed collectors are exempt without limitation. CT 180, Assem. Comm. on Public Safety, Analysis of Assem. Bill 202 (1999-2000 Reg. Sess.) as amended March 10, 1999, at 3 ("exempt institutions, persons and situations include" "[a]ny licensed collector"); CT 184, Sen. Comm.

on Public Safety, Analysis of Assem. Bill 202 (1999-2000 Reg. Sess.) as amended April 6, 1999, at 2 ("Exempts . . . licensed collectors"); CT 191, Assem. Comm. on Appropriations, Analysis of Assem. Bill 202 (1999-2000 Reg. Sess.) as amended March 10, 1999, at 1 ("The bill also provides specified exemptions for law enforcement, licensed collectors, etc."). *See also* 194, Office of Criminal Justice Planning, Enrolled Bill Report, Assem. Bill. 202 (1999-2000 Reg. Sess.) as amended April 6, 1999, at 3 ("This bill will exempt . . . licensed collectors").

That the licensed collectors' exemption is not limited to purchases of curios or relics is further confirmed by the legislative history of a predecessor bill introduced the previous session by the same author.[9] Assembly Bill 532 (1997-1998 Reg. Sess.) contained a one-handgun-per-month scheme virtually identical to the one adopted in AB 202. The

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[9] Legislative history of an unpassed bill is relevant and entitled to weight when considering a subsequent bill with identical language. *See United States v. Enmons*, 410 U.S. 396, 405 n.14 (1973) (the legislative history of an unenacted bill is "wholly relevant to an understanding of" a subsequently enacted statute containing the same operative language); *Transcontinental & Western Air, Inc. v. Civil Aero. Bd.*, 336 U.S. 601, 605 & n.6 (1949) (relying on legislative history to prior unenacted bill for clarification of language used in bill that was ultimately enacted); *State of Arizona v. Atchison, Topeka and Santa Fe Railroad Co.*, 656 F.2d 398, 404 n.6 (9th Cir. 1981) ("In ascertaining the intent of Congress, we see no objection to giving some weight to clear legislative histories of prior bills that are identical to the law we are called on to interpret."); *accord Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980).

initial draft of AB 532 did not include an exemption for licensed collectors. When the Assembly Committee on Public Safety considered the proposed amendment adding language identical to the exemption in Section 27535(b)(9), it observed that "[a]s drafted and proposed to be amended, the bill does not affect" "[t]he 400 some odd California federally licensed collectors *as to any firearm acquisition*." CT 201, Assem. Comm. on Public Safety, Analysis of Assem. Bill 532 for April 8, 1997 hearing (1997–1998 Reg. Sess.), at 5 (emphasis added).[10]

To that same end, the author's notes for the hearing on the proposed amendment explain that the collectors' exemption applies to purchases of new handguns:

> What effect does exempting collectors of curios and relics licensed under federal [law] have?
>
> > It permits serious collectors of *new handguns* [to] go through the federal licensing process – including undergoing scrutiny of a background check and payment of a $30 fee – to qualify as an exempt party under AB 532.

CT 205, Author's file, Assem. Bill 532 (1997-1998 Reg. Sess.), Notes re: April 8, 1997 Hearing of Assem. Comm. on Public Safety, at 2 (emphasis added).

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[10] This legislative history's reference to the small number of collectors further demonstrates that the Legislature understood the exception involved a narrow class of highly regulated individuals.

In the trial court, the State's principal argument regarding legislative history is that the exemption is inconsistent with the Legislature's broader purpose when enacting the statute, which was designed to curtail gun trafficking and reduce straw purchases. (CT 304, State Opp. MSJ at 7:4–10.) Even if that were the case, it is insufficient to override both the plain language of the statute and the evidence that the Legislature understood and intended the exemption to apply to licensed collectors as a class—without respect to the type of firearm purchased. Legislation is the "product of multiple and somewhat inconsistent purposes that led to certain compromises." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring). Section 25735, "like most laws, might predominantly serve one general objective," "while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole." *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003); *accord Hernandez v. City of Hanford*, 41 Cal. 4th 279, 300–02 (2007) (citing *Fitzgerald* and *Fritz*).[11]

[11] In a similar vein, one court explained: "[I]t is the language of the statute itself that has successfully braved the legislative gauntlet. It is that language which has been lobbied for, lobbied against, studied,

The trial court brushed this legislative history aside, largely based on its view that Appellants' interpretation would allow the Federally-Licensed Collectors' Exemption to be used to purchase "unlimited" numbers of handguns. (*See* CT 512–13.) While the trial court may have been concerned about the consequences of Appellants' arguments, ignoring the plain language of the statute and its legislative history is improper. No court "is at liberty to substitute its judgment for that of the Legislature in determining how far [a] statute should reach, no matter what good intentions may urge such an action." *English v. IKON Bus. Sols., Inc.*, 94 Cal. App. 4th 130, 148 (2001). "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; . . . the choice among competing policy considerations in enacting laws is a legislative function." *Super. Ct. v. Cnty. of Mendocino*, 13 Cal. 4th 45, 53 (1996).

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proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor." *Halbert's Lumber v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1238 (1992). Indeed, the Court is bound to follow the plain meaning of the statute, "whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature." *In re D.B.*, 58 Cal. 4th 941, 948 (2014).

* * *

In sum, the New Regulation is void because it limits the express scope of Section 27535(b)(9)'s exemption, thereby preventing citizens whom the Legislature determined were eligible from exercising their statutory rights. "[A]n agency does not have discretion to promulgate regulations that are inconsistent with the governing statute, alter or amend the statute, or enlarge its scope." *Cal. Sch. Bds. Ass'n*, 191 Cal. App. 4th at 544. And "[w]here regulations are void because of inconsistency or conflict with the governing statute, a court has a duty to strike them down." *Id.*

II. The New Regulation Is Void Because It Was Not Adopted In Compliance With The APA.

The New Regulation is void because the DOJ failed to comply with the Administrative Procedure Act ("APA") before its adoption. "The APA establishes the procedures by which state agencies may adopt regulations." *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 568 (1996). "If a policy or procedure falls within the definition of a 'regulation' within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulation, which include public notice and approval by the Office of Administrative Law (OAL)." *Kings Rehabilitation Ctr., Inc. v. Premo*,

69 Cal. App. 4th 215, 217 (1999).

In *Morning Star*, the California Supreme Court spelled out the APA's procedural rulemaking requirements:

> The agency must give the public notice of its proposed regulatory action ([Gov. Code] §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (*id.*, § 11346.2, subds. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (*id.*, § 11346.8); respond in writing to public comments (*id.*, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (*id.*, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity. (*Id.*, §§ 11349.1, 11349.3.) Any regulation or order of repeal that substantially fails to comply with these requirements may be judicially declared invalid.

38 Cal. 4th at 333 (citation omitted)

Failure to follow the APA's procedures "voids the agency action." *Cal. Grocers Ass'n v. Dep't of Alcoholic Beverage Control*, 219 Cal. App. 4th 1065, 1068 (2013). And "[a] rule that violates the APA is void regardless that its interpretation is a correct reading of the law." *Id.* "A regulation that is adopted inconsistently with the APA is an 'underground regulation' and may be declared invalid by a court." *Bollay v. Cal. Office of Admin. Law*, 193 Cal. App. 4th 103, 106–07 (2011); *see also, e.g.*, *Capen v. Shewry*, 155 Cal. App. 4th 378, 386–87 (2007).

A. DOJ Did Not Dispute Below That The New Regulation Constitutes A Regulation Under the APA.

The APA defines "regulation" broadly to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Gov. Code § 11342.600. "[A]bsent an express exception, the APA applies to all generally applicable administrative interpretations of a statute." *Morning Star*, 38 Cal. 4th at 335. The California Supreme Court has explained that: "A regulation subject to the APA . . . has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. . . . Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.'" *Tidewater Marine W.*, 14 Cal. 4th at 571 (citations omitted). Put another way, "a rule applies generally so long as it declares how a certain class of cases will be decided." *Id.*; *see also Cnty. of San Diego v. Bowen*, 166 Cal. App. 4th 501, 508 n.5 (2008) ("statutory constraints on an agency's ability to adopt regulations apply with equal force to more informal agency action because '[a]n agency may not exceed the limits

of its authority by adopting and enforcing a policy which would not be permitted as a formally adopted regulation'") (quoting *Agnew v. State Bd. of Equalization*, 21 Cal. 4th 310, 321 (1999)); *see also Agnew*, 21 Cal. 4th at 321 ("These rules [governing an agency's rulemaking authority] are equally applicable to an administrative agency policy which has the effect of a regulation.").

The new policy announced in the May 2014 letter plainly qualifies as a "regulation": it purports to interpret Penal Code section 27535, it applies to all licensed firearms dealerships in California, and it applies to all persons who seek to utilize the exemption identified at Penal Code section 27535(b)(9). Gov. Code § 11342.600.

Because the DOJ did not comply with the APA's procedural requirements when adopting the policy, it is void as an underground regulation. *Bollay*, 193 Cal. App. 4th at 106–07.

B. The New Regulation Is Not The Only Legally Tenable Interpretation Of The Federally-Licensed Collector's Exemption.

At the trial court, the State conceded that it did not comply with the APA before adopting the enforcement policy. It took the remarkable position that the policy is exempt from APA rulemaking procedures because it represents "the only legally tenable interpretation" of the exemption because it "correctly construed" the statute. (CT 307, State

Opp. MSJ at 10:9–16; *see also* Gov. Code § 11340.9(f) (exempting from the APA "[a] regulation that embodies the only legally tenable interpretation of a provision of law").

DOJ cannot establish that its policy qualifies for this narrow exception, which "applies only in situations where the law 'can reasonably be read only one way,' such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language." *Morning Star*, 38 Cal. 4th at 336–37. *See also, e.g.*, *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 234 Cal. App. 4th 214, 262–63 (2015) (applying rule and striking down state agency rule as an underground regulation).

The circumstances here reveal why it cannot possibly be correct to argue that the New Regulation is "rote, ministerial or otherwise patently compelled by" the Federally-Licensed Collector's Exemption. It defies reality to claim that state agency can reverse a "long-standing policy" and then avoid the rigor of the APA by arguing that the new and completely different interpretation of law is the only tenable interpretation. The *very existence* of a prior interpretation demonstrates that other "tenable" interpretations exist, even if the agency concludes

that the prior interpretation was wrong.[12] Likewise, the very fact that it took the Superior Court four single-spaced pages of analysis to explain that the New Regulation is supposedly correct, CT 520–23, reveals that the New Regulation is not applying the exemption in a manner that is "essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language." *Morning Star*, 38 Cal. 4th at 336–37.

In any event, in *Morning Star*, the Supreme Court rejected precisely the sort of circular reasoning that the State and the Superior Court relied on below: "Whether [an agency] has adopted the sole 'legally tenable' reading of [a statute] represents a different question than whether its interpretation is ultimately correct," because otherwise "the exception would swallow the rule." *Id.* at 336.

As a result, the exception does not apply to the New Regulation, and it is void due to DOJ's failure to follow the APA. If DOJ wants to adopt a new policy interpreting the Federally-Licensed Collectors' Exemption, it must do so by adopting a regulation.

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[12] The trial court dismissed the Merrilees E-mail, concluding that plaintiffs made "no showing that the DOJ has reversed course on a long standing policy such that" its new position is not entitled to deference. (CT 513.) That's precisely what the Merrilees E-mail shows.

C. The State's Public Policy Concerns About The Scope Of The Exemption Are Best Addressed Through The APA's Open Rulemaking Process.

The State argued, and the Superior Court appeared to agree, that its new interpretation was based on public-policy concerns that DOJ's prior interpretation of the Federally-Licensed Collector Exemption would allow a potential parade of horribles because the Federally-Licensed Collectors' Exemption could be used to purchase large numbers of handguns. (*See* State's Opp. to Pls. MSJ, CT 308 (arguing that Plaintiffs' interpretation of the exemption "leads to absurd results" because "[curio and relic] license holders could quickly access large quantities of high-threat weapons"); MSJ Order, CT 512 ("Plaintiffs' interpretation of the [curio and relic] Exemption would effectively elevate a curio and relic license, when combined with a Certificate of Eligibility, into a license to buy any handgun . . . in unlimited quantities and with unlimited frequency."); CT 513 (concluding that the legislative history "does not reflect a goal of permitting collectors of curios and relics to purchase an unlimited number of modern handguns.").

These important safety concerns could be explored in the regulatory process. By bypassing the APA, DOJ has shielded its decisionmaking process from public scrutiny. A key purpose of the APA

"is to ensure that those persons or entities whom a regulation will affect have a voice in its creation." *Tidewater Marine W.*, 14 Cal. 4th at 568. The Supreme Court has explained that public participation in the rulemaking process is critical to ensure responsive and effective governance:

> The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. . . . [P]ublic participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.

Id.

In this case, the rulemaking process would allow for inquiry into whether, in fact, there has ever been a case of a federally-licensed collector abusing the exemption. Likewise, the rulemaking process would allow for collection of evidence, if there is any, of the extent to which federally-licensed collectors have ever engaged in any of the conduct the State says justifies its new interpretation of the law. The State may wish to avoid the risk that the evidence does not match its worldview, but allowing the public and the regulated community to make the argument is precisely the point of the APA.

In the end, the State may decide to press ahead with its new interpretation regardless of what the evidence says. But under the

APA, the regulated community deserves the opportunity to make a public record disputing the policy assumptions underlying a regulation.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the trial court.

Respectfully submitted,

Dated: February 23, 2017

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CERTIFICATE REQUIRED BY RULE 8.204(c)(1)

The text of this brief is comprised of 7,548 words as counted by the Microsoft Word® software program used to prepare this brief.

Respectfully submitted,

Dated: February 23, 2017

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PROOF OF SERVICE AND DELIVERY

I, Kelly Rosenbery, declare that:

I am an employee of the law firm of Benbrook Law Group, PC, 400 Capitol Mall, Suite 1610, Sacramento, California. I am over 18 years of age and am not a party to the within action.

On February 23, 2017, I submitted an electronic copy of Appellants' Opening Brief, to the Third District Court of Appeal through the Court's TrueFiling system.

On February 24, 2017, I served a copy of Appellants' Opening Brief on the interested parties to this action by mailing a copy of the original by U.S. mail as follows:

Hon. David I. Brown Gordon D. Schaber Sacramento County Courthouse 720 9th Street Sacramento, CA 95814	

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

s/ Kelly Rosenbery
Kelly Rosenbery