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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF ALAMEDA**

11  
12 DEPARTMENT OF FAIR EMPLOYMENT AND  
HOUSING, an agency of the State of California,

13 Plaintiff,

14 v.

15 TESLA, INC., doing business in California as  
16 TESLA MOTORS, INC., and DOES ONE through  
FIFTY, inclusive,

17 Defendants.

Case No.: 22CV006830

Assigned to The Honorable Evelio Grillo

**VERIFIED CROSS-COMPLAINT FOR  
DECLARATORY RELIEF AND WRIT  
OF MANDATE**

Compl. Filed: Feb. 9, 2022  
FAC Filed: March 11, 2022

18  
19 TESLA, INC., a Delaware Corporation doing  
business in California as TESLA MOTORS, INC.,

20 Petitioner and Cross-Complainant,

21 v.

22 CALIFORNIA CIVIL RIGHTS DEPARTMENT,  
23 formerly known as DEPARTMENT OF FAIR  
EMPLOYMENT AND HOUSING,

24 Respondent and Cross-Defendant.  
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1 **INTRODUCTION**

2 1. Pursuant to Sections 428.10(b), 1060 and 1094.5 of the California Code of Civil  
3 Procedure (“CCP”), Petitioner and Cross-Complainant Tesla, Inc. (“Tesla”) brings this Verified  
4 Cross-Complaint for Declaratory Relief and Writ of Mandate (the “Cross-Complaint”) against  
5 Respondent and Cross-Defendant the California Civil Rights Department (“CRD,” formerly known  
6 as the Department of Fair Employment and Housing, or “DFEH”). The claims asserted in the Cross-  
7 Complaint arise in relevant part out of the same transaction, occurrence, or series of transactions and  
8 occurrences as those alleged in the First Amended Civil Rights Complaint for Injunctive and  
9 Monetary Relief (“FAC”) brought by CRD against Tesla. Through the Cross-Complaint, Tesla  
10 seeks a writ of mandate and declaratory relief from the invalid rulemaking of CRD, which has  
11 improperly adopted and is generally applying rules, regulations and/or procedural standards in  
12 violation of the California Administrative Procedure Act (“APA”). Cal. Gov’t Code § 11340.5(a),  
13 11342.600, 11349.1. These rules, regulations and/or standards constitute invalid underground  
14 regulations under the APA, and have been and will continue to be unlawfully applied by CRD to  
15 Tesla and other California employers absent the relief requested herein.

16 2. CRD has subverted and continues to subvert the statutory and regulatory framework  
17 of the California Fair Employment and Housing Act (“FEHA”), Cal. Gov’t Code § 12940, *et seq.*,  
18 with its own *ultra vires* rules of procedure. CRD’s underground regulations unlawfully permit it to  
19 (a) initiate employer investigations without disclosing the factual bases for such investigations, (b)  
20 issue “cause” determinations against employers without providing any information in support of  
21 those determinations, (c) file civil suits against employers without first engaging in good faith  
22 conciliation and mediation, (d) file civil suits against employers on claims not previously  
23 investigated and/or concerning which the employers were provided no pre-suit notice, and (e)  
24 demand that employers waive their legal rights and protections as a condition precedent for CRD’s  
25 performing its statutorily required acts, including conciliation and mediation.

26 **PARTIES**

27 3. Tesla is an electric vehicle and clean energy company founded in California. Tesla  
28 employs over 20,000 workers at its facility in Fremont, California—the last remaining auto

1 manufacturing plant in the state. While other manufacturers have left California for less expensive  
2 and less restrictive locales, Tesla is proud to provide high-paying jobs that equip Californians with  
3 valuable skills and training, as well as an opportunity to share in the ownership of the company  
4 through stock incentives at all levels.

5 4. Tesla values and has invested in the Fremont community, its Fremont facility, and its  
6 workforce. Those investments include substantial commitments to diversity, inclusion, and  
7 community outreach, which may account for the Fremont facility’s majority-minority workforce  
8 (*i.e.*, the majority of employees are from historically underrepresented backgrounds). Providing  
9 these opportunities and investing in Fremont benefits not only Tesla’s workers but also Tesla and,  
10 more broadly, the state.

11 5. CRD is the state agency charged with protecting Californians from employment  
12 discrimination, including through its administration and enforcement of the FEHA. Cal. Gov’t Code  
13 § 12940, *et seq.*; *see also About CRD*, <https://calcivilrights.ca.gov/aboutdfeh/>. Historically, CRD  
14 assisted workers and employers alike by serving as a neutral agency responsible for investigating  
15 and resolving complaints—reserving litigation for only the most severe situations of employer  
16 malfeasance. Indeed, the legislative history of Assembly Bill 738, which first assigned the Division  
17 of Fair Employment Practices (a predecessor agency to CRD) with responsibility for investigating  
18 and conciliating employment complaints, described the goal of the Legislature “to build as much due  
19 process as possible so that all parties to a complaint are protected from capricious or arbitrary  
20 action.”<sup>1</sup> Unfortunately, CRD (or a segment thereof) has abandoned these founding principles in  
21 recent years, as evidenced by the unlawful underground rulemaking described herein.

22 **JURISDICTION AND VENUE**

23 6. Tesla has performed all conditions precedent to the filing of the Cross-Complaint, to  
24 the extent any such conditions exist. The Court’s jurisdiction is invoked pursuant to Sections 1060  
25 (Declaratory Relief) and 1094.5 (Writ of Mandate) of the CCP. Venue in Alameda County is proper  
26 under Sections 395 and 401 of the CCP.

27 \_\_\_\_\_  
28 <sup>1</sup> *See* Request for Judicial Notice in Support of Defendant Tesla Inc.’s Motion to Stay, Exhibit A (excerpts from legislative history of AB 738)

## GOVERNING LAW

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2           7.       The APA broadly defines a “regulation” as “every rule, regulation, order, or standard  
3 of general application...adopted by any state agency to implement, interpret, or make specific the  
4 law enforced or administered by it or to govern its procedure.” Cal. Gov’t Code § 11342.600.  
5 Under this expansive definition, any general rule or guideline intended to govern how an agency  
6 carries out its statutory obligations qualifies as a regulation subject to the APA. *See Malaga Cnty.*  
7 *Water Dist. v. Cent. Valley Reg’l Water Quality Control Bd.*, 58 Cal. App. 5th 418, 436 (2020) (“[A]  
8 regulation under the APA is any order or standard of general application by any state agency to  
9 govern its procedure.”). A regulation need not be in writing in order to be subject to the APA. *See*  
10 *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 336 (2006) (“We decline to endorse  
11 an approach that would allow an agency to avoid APA requirements simply by driving its  
12 regulations further underground [by failing to put them in writing].”).

13           8.       In order for a regulation to be promulgated in compliance with the APA, the proposed  
14 regulation must be published along with the state agency’s statement of reasons for the regulation.  
15 Cal. Gov’t Code § 11346.2(a)–(b), 11346.4. In addition, the agency must solicit and provide the  
16 opportunity for public comment on the proposed regulation. *Id.* § 11346.8. The agency must  
17 respond in writing to any public comment and also hold a public hearing on the proposed regulation.  
18 *Id.* The agency must transmit the rulemaking record (*i.e.*, its record of compliance with the APA) to  
19 the California Office of Administrative Law (“OAL”), file a copy of the regulation with the  
20 California Secretary of State, and post the regulation on its website. Cal. Gov’t Code § 11343(a),  
21 (c)(1), 11347.3(c). Any failure by the agency to comply with the requirements of the APA in  
22 promulgating a regulation renders the regulation invalid and unenforceable. *See Vasquez v. Dep’t of*  
23 *Pesticide Regul.*, 68 Cal. App. 5th 672, 684 (2021) (“[A]ny regulation not properly adopted under  
24 the APA is considered invalid.” (quoting *Reilly v. Superior Ct.*, 57 Cal. 4th 641, 649 (2013))).

25           9.       Although CRD has statutory authority “[t]o adopt, promulgate, amend, and rescind  
26 suitable procedural rules and regulations to carry out [its] investigation, prosecution, and dispute  
27 resolution duties,” it must do so in compliance with the APA, and no exemption from that  
28 requirement exists under California law. Cal. Gov’t Code §§ 11340.5, 12930(e).

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