SENIOR PARTNER
C. D. Michel*

MANAGING PARTNER
Joshua Robert Dale

SPECIAL COUNSEL
Eric M. Nakasu
W. Lee Smith

ASSOCIATES
Anna M. Barvir
Sean A. Brady
Matthew D. Cubeiro
Margaret E. Leidy
Joseph A. Silvoso, III
Nicholas W. Stadmiller
Los Angeles, CA

* Also admitted in Texas and the District of Columbia

MICHEL & ASSOCIATES, P.C.
Attorneys at Law

OF COUNSEL
Scott M. Franklin
Clint B. Monfort
Michael W. Price
Los Angeles, CA

WRITER'S DIRECT CONTACT:
562-216-4444
jsilvoso@michellawyers.com

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Office of Administrative Law
ATTN: OAL Reference Attorney
Deputy Director Beverly Johnson
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
staff@oal.ca.gov
Beverly.johnson@oal.ca.gov
VIA FEDEX, EMAIL

Department of Justice, Bureau of Firearms
ATTN: Jacqueline Dosch
P.O. Box 160487
Sacramento, CA 95816
Regulations@doj.ca.gov
jacqueline.dosch@doj.ca.gov
VIA FEDEX, EMAIL

RE: OPPOSITION to Department of Justice's Proposed Regulations Regarding "Bullet-Button Assault Weapons" on the Grounds that They Do Not Qualify for the Exemption to the Administrative Procedure Act Provided by Penal Code Section 30900(b)(5), Unlawfully Conflict with Statutes, or Are Unlawfully Vague and Confusing

To Whom It May Concern:

We write on behalf of our clients, the National Rifle Association of America ("NRA") and the California Rifle & Pistol Association, Incorporated ("CRPA"), as well as their respective members throughout California, to oppose regulations submitted to the Office of Administrative Law ("OAL") by the California Department of Justice ("DOJ") relating to "Bullet-Button Assault Weapons" (OAL Regulatory Action Number 2017-0512-02FP). These regulations purport to amend sections 5469 and 5473 of Title 11, Division 5 of the California Code of Regulations ("C.C.R.") and add sections 5470-5472, 5474-5474.2, and 5475-5478. Many problems plague DOJ's proposed "Bullet-Button Assault Weapon" regulations, making them void and unenforceable.

DOJ submitted these proposed regulations on May 12, 2017, requesting expedited review from the OAL and refusing to disclose copies of these proposed regulations to members of the public who requested them. Emphasizing this point, the following information may be found on DOJ's website:

> On May 12, 2017, the Department of Justice filed proposed draft regulations with the Office of Administrative Law (OAL) for a File and Print rulemaking action. The draft regulations are not open for public comment due to the exemption set forth in Penal Code section 30900. Per the stated exemption, the Department is not required to provide further clarification.[1]

DOJ ultimately did post the proposed regulations on its website[2] on or about May 22, 2017, days after they were obtained from the OAL and widely distributed by the NRA/CRPA and other pro-Second Amendment groups.

These proposed regulations are virtually identical to those that DOJ previously submitted to the OAL on December 30, 2016, and subsequently withdrew on February 10, 2017 (OAL Regulatory Action Number 2016-1229-01FP). And, like the previous ones, DOJ improperly seeks to shoehorn these proposed regulations into the exemption provided by section 30900, subdivision (b)(5). Instead of spending the time since February 10, 2017 to formally adopt regulations through the Administrative Procedure Act's ("APA") rulemaking process, DOJ apparently spent that time writing a cover letter attempting to justify its desire to avoid the APA process. The result is DOJ's May 4, 2017 letter addressed to OAL Director Debra M. Cornez ("DOJ's May 4th Letter" or "May 4th Letter").

As it did in December 2016, DOJ now claims again that each of its proposed regulations is entirely exempt from the APA rulemaking process by way of Penal Code section 30900, subdivision (b)(5). That section, however, only provides DOJ a limited exemption from the APA rulemaking process for regulations relating solely to the *registration* of *newly defined* "assault weapons." There can be little doubt that various provisions of DOJ's proposed regulations are unrelated to registration. Even if there is an argument they relate to registration, DOJ cannot be given the benefit of the doubt that its proposed regulations are exempt from the APA because "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA" and against DOJ.[3]

DOJ is aware of the limited scope of the applicable APA exemption. Its titling of every proposed section as "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1)" – regardless of how tenuous the connection to registration is – makes that obvious. Through its improper proposed regulations, DOJ clearly seeks to expand its authority and extend the definition of "assault weapon" to cover a wider range of firearms than those contemplated by the Penal Code. This obvious, and at times ham-fisted, attempt to circumvent the APA is only made more egregious given DOJ's recent track record with its proposed regulations concerning "large-capacity" magazines (*i.e.*,

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[1] State of California Department of Justice, Bureau of *Firearms*, https://oag.ca.gov/firearms (last visited June 5, 2017).

[2] State of California Department of Justice, *Firearm Regulations/Rulemaking Activities*, https://oag.ca.gov/firearms/regs (last visited June 5, 2017).

[3] *California School Boards Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1328, *as modified on denial of reh'g* (Aug. 24, 2010) (internal citations and quotation marks omitted).

withdrawing its "large-capacity" magazine regulations like it did with its "assault weapon" regulations) and its shenanigans implementing timely regulations for "Firearm Safety Certificates."[4]

Moreover, many of the proposed provisions unlawfully conflict with current California law or are ambiguous and confusing. As a result, DOJ should rescind its problematic and improper regulations—or otherwise be prevented from implementing them.

I. "ASSAULT WEAPON" LAW BACKGROUND: DEFINITIONS, TERMS, & REGISTRATION

Under California law, it is generally illegal to manufacture, import, transfer (whether sold, gifted, or lent), or offer for sale, any firearm defined as an "assault weapon,"[5] or to possess such a firearm,[6] unless it is properly registered. A firearm can meet the definition of an "assault weapon" two ways: (1) it is expressly listed in the Penal Code or C.C.R. as an "assault weapon,"[7] and/or (2) it has certain features.[8] Pertinent to this discussion is the latter definition.

A. Pre-2017 Definition of "Assault Weapon" Based on the Firearm's Features

Before 2017, a firearm met the "assault weapon" definition based on its features if it was any of the following:

(1) A semiautomatic, centerfire rifle ***that has the capacity to accept a detachable magazine and any one of the following***:
- (A) A pistol grip that protrudes conspicuously beneath the action of the weapon.
- (B) A thumbhole stock.
- (C) A folding or telescoping stock.
- (D) A grenade launcher or flare launcher.
- (E) A flash suppressor.
- (F) A forward pistol grip.

(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.

(3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

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[4] *See* Motion for Attorney Fees, *Belemjian v. Harris*, No. 15CECG00029, 2015 WL 11029973 (Cal.Super. Aug. 25, 2015). The Belemjian plaintiffs' lawsuit charged that DOJ's failure to comply with the requirements of the APA in announcing rules for the Firearm Safety Certificate Program administration, and to adopt the legislatively mandated regulations for the safety demonstrations, denied the public their statutory right to notice and an opportunity to be heard. Sometime after the plaintiffs brought suit, DOJ voluntarily initiated APA compliance, giving the plaintiffs the relief they sought.

[5] Pen. Code, § 30600.

[6] Pen. Code, § 30605.

[7] *See* Pen. Code, § 30510; Cal. Code Regs. title 11, § 5499.

[8] *See* Pen. Code, § 30515.

(4) A semiautomatic pistol ***that has the capacity to accept a detachable magazine and any one of the following***:
- (A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.
- (B) A second handgrip.
- (C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning the bearer's hand, except a slide that encloses the barrel.
- (D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

(6) A semiautomatic shotgun that has both of the following:
- (A) A folding or telescoping stock.
- (B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.

(7) A semiautomatic shotgun that has the ability to accept a detachable magazine.

(8) Any shotgun with a revolving cylinder.[9]

We emphasize subdivisions (a)(1) and (a)(4) to highlight the only two sections that are modified by the recent change in California law and that serve as the basis of the proposed regulations at issue.

1. DOJ's Original "Assault Weapon" Regulations Implemented in 2000 and the Definitions of Key "Assault Weapon" Terms Under Current California Code of Regulations

In 2000, DOJ promulgated the original "assault weapon" regulations (which are currently still in effect) in accordance with the standard APA rulemaking process. It defined these key terms: (a) "Detachable magazine," (b) "Flash suppressor," (c) "Forward pistol grip," (d) "Pistol grip that protrudes conspicuously beneath the action of the weapon," and (e) "Thumbhole stock."[10] DOJ did not make any other definitions implementing the "assault weapon" law in 2000.

These regulations also provided for the registration of "assault weapons" based on those features, established fees, and set processing times. It is safe to say that thousands to tens of thousands of people registered "assault weapons" based on the DOJ's definitions during 2001.

2. Detachable Magazine and "Bullet Button" Firearms

Prior to 2017, some firearm owners, dealers, and manufacturers made their firearms "California compliant" by removing the "detachable magazine" feature from their firearms so that their firearms no

[9] Pen. Code, § 30515(a) (2016).
[10] Cal. Code Regs. tit. 11, § 5469.

longer met the legal definition of "assault weapon." In making the firearms' magazine "non-detachable," they typically retrofitted their firearms with an aftermarket product generally called a "magazine lock." The most common kind is known as a "bullet button" (hence the title of the proposed regulations).

Whereas the standard magazine release for a "detachable magazine" can usually operate with the push of a finger, the typical "magazine lock" replaces the standard one-piece magazine release button with a two-piece assembly that cannot be operated with just the push of a finger; rather a tool is needed to reach the button to release the magazine so it can be removed. The most common "tool" used to remove the magazine is the tip of a bullet: thus the common term "bullet button." Because a tool is needed to release the magazine, and because current California regulations consider a magazine not to be "detachable" if a "tool" is required to remove it from the firearm, a firearm with a magazine lock can no longer be said to have "the capacity to accept a detachable magazine."[11]

For years, firearm owners, dealers, manufacturers, and lawyers made countless attempts to obtain DOJ's official opinion on the legality of attaching a "bullet button" to these "assault weapons." However, DOJ had stopped its previous practice of providing Californians with guidance on firearms law. So firearm owners, dealers, and manufacturers were left entirely on their own to ascertain whether the attachment of a "bullet button" effectively excluded a firearm from the pre-2017 "assault weapon" definition. Based on DOJ's silence and lack of enforcement on the matter, Californians assumed (and assumed correctly) that such a practice was legal and, thus, continued it for years. It was not until 2011, in the context of a lawsuit,[12] that DOJ opined on the record that "bullet buttons" rendered the firearm's magazine "non-detachable."

Therefore, based much on DOJ's actions, the practice of attaching a magazine lock like a "bullet button" to a firearm (that would qualify as an "assault weapon" if it had "the capacity to accept a detachable magazine") came into being and was officially recognized to remove one of the key features necessary to cause a firearm to meet the "assault weapon" definition.[13] This means that, prior to 2017, a "bullet button" could be used to remove a majority of firearms from the "assault weapon" definition, thereby making them legal, "California compliant" firearms.

The Legislature viewed this practice, some fifteen years later, as a "loophole" to the "assault weapon" restrictions, and it became the impetus driving Assembly Bill ("AB") 1135 and Senate Bill ("SB") 880, which changed the "assault weapon" definitions for rifles and pistols (but not shotguns) so that they no longer include the feature affected by the "bullet button." These bills' purpose was to make it so that equipping a pistol or rifle with a "bullet button" alone is no longer sufficient to take that firearm outside the definition of an "assault weapon."

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[11] *See* Cal. Code Regs. tit. 11, § 5469(a). "Detachable magazine' means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool. Ammunition feeding device includes any belted or linked ammunition, but does not include clips, en bloc clips, or stripper clips that load cartridges into the magazine."

[12] *See* Motion to Dismiss for Defendants at 1-2, 7-8, *Haynie v. Harris* (N.D. Cal., Mar. 4, 2014, No. C 10-01255 SI) 2014 WL 899189, *available at* http://ia600300.us.archive.org/32/items/gov.uscourts.cand.225676/gov.uscourts.cand.225676.26.1.pdf.

[13] *See* Pen. Code, § 30515(a)(1), (a)(4) (2016).

B. 2017 Definition of "Assault Weapon" and the New Registration Process

AB 1135 and SB 880 amended the definition of a features-based "assault weapon" as follows:

(1) A semiautomatic, centerfire rifle ***that does not have a fixed magazine but has any one of the following***:
- (A) A pistol grip that protrudes conspicuously beneath the action of the weapon.
- (B) A thumbhole stock.
- (C) A folding or telescoping stock.
- (D) A grenade launcher or flare launcher.
- (E) A flash suppressor.
- (F) A forward pistol grip.

(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.

(3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

(4) A semiautomatic pistol ***that does not have a fixed magazine but has any one of the following***:
- (A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.
- (B) A second handgrip.
- (C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning the bearer's hand, except a slide that encloses the barrel.
- (D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

(6) A semiautomatic shotgun that has both of the following:
- (A) A folding or telescoping stock.
- (B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.

(7) A semiautomatic shotgun that has the ability to accept a detachable magazine.

(8) Any shotgun with a revolving cylinder.

(b) ***For purposes of this section, "fixed magazine" means an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.***[14]

[14] Pen. Code, § 30515.

Again, we emphasize subdivisions (a)(1) and (a)(4), and additionally highlight subdivision (b), to underscore the only changes made in the definition of "assault weapon" from 2016 to 2017 under AB 1135 and SB 880. Aside from changing the language from "that has the capacity to accept a detachable magazine and any one of the following" to "that does not have a fixed magazine but has any one of the following" and then defining "fixed magazine," the Legislature made no other change to the definition of "assault weapon." It did not change or make additions to any of the section's other terms or phrases. *All* of the other features or characteristics that cause a firearm to meet the definition of an "assault weapon" are unchanged.

The Legislature's amendments to Penal Code section 30515 converted hundreds of thousands of rifles and pistols owned by California residents into newly-defined "assault weapons." And with the registration period for "assault weapons" being closed under current law, the Legislature needed to allow for the continued possession of those newly defined "assault weapons" after January 1, 2017 (and prior to registration). Thus, the Legislature created Penal Code section 30680 stating:

> Section 30605 [the code section restriction possession of assault weapons] does not apply to the possession of an assault weapon by a person who has possessed the assault weapon prior to January 1, 2017, if all of the following are applicable:
>
> (a) Prior to January 1, 2017, the person was eligible to register that assault weapon pursuant to subdivision (b) of Section 30900.
>
> (b) The person lawfully possessed that assault weapon prior to January 1, 2017.
>
> (c) The person registers the assault weapon by January 1, 2018,[15] in accordance with subdivision (b) of Section 30900.

The Legislature also amended Penal Code section 30900 to create a registration process for these firearms meeting the new definition of "assault weapon" so that existing owners could lawfully continue to possess them. The Legislature renumbered the previous (and mostly defunct) registration section and added a new subdivision (b) for this purpose.

In pertinent part, the new subdivision (b) of section 30900 provides:

> (1) Any person who, from January 1, 2001, to December 31, 2016, inclusive, lawfully possessed an assault weapon that does not have a fixed magazine, as defined in Section 30515, including those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool, shall register the firearm before January 1, 2018, but not before the effective date of the regulations adopted pursuant to

[15] Assembly Bill 103 proposes to extend the registration deadline from January 1, 2018 to July 1, 2018. Assembly Bill 103, 2017-2018 Leg., Reg. Sess. (Cal. 2017), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB103 (last visited June 9, 2017). However, because Assembly Bill 103 is pending and has not been passed into law yet, January 1, 2018 will still be treated as the applicable registration deadline for the purposes of this Letter.

paragraph (5), with the department pursuant to those procedures that the department may establish by regulation pursuant to paragraph (5).

(2) Registrations shall be submitted electronically via the Internet utilizing a public-facing application made available by the department.

(3) The registration shall contain a description of the firearm that identifies it uniquely, including all identification marks, the date the firearm was acquired, the name and address of the individual from whom, or business from which, the firearm was acquired, as well as the registrant's full name, address, telephone number, date of birth, sex, height, weight, eye color, hair color, and California driver's license number or California identification card number.

(4) The department may charge a fee in an amount of up to fifteen dollars ($15) per person but not to exceed the reasonable processing costs of the department. The fee shall be paid by debit or credit card at the time that the electronic registration is submitted to the department. The fee shall be deposited in the Dealers' Record of Sale Special Account to be used for purposes of this section.

(5) ***The department shall adopt regulations for the purpose of implementing this subdivision. These regulations are exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).***

Paragraph (5) makes clear that only regulations whose purpose is implementing "this subdivision," *i.e.*, subdivision (b) of section 30900, are exempt from the APA. This means that DOJ's exemption from the APA is limited to only those regulations relating to:

(1) "those procedures" as stated in (b)(1) to register "an assault weapon that does not have a fixed magazine, as defined in Section 30515, including those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool," *i.e.*, the newly classified "assault weapons";

(2) the electronic submission of the registration of an "assault weapon" defined in (b)(1), in compliance with (b)(2);

(3) the information to be contained in the registration as required (and limited) by (b)(3); and

(4) the amount of the registration fee and how to pay it in compliance with (b)(4).

In sum, any regulations unrelated to Paragraphs (1)-(4) of subdivision (b) are ***not*** exempt from the APA.

II. LEGAL BACKGROUND RE: PERMISSIVE SCOPE OF A GOVERNMENT AGENCY'S RULEMAKING POWER

On the first and last pages of its May 4th Letter, DOJ misleadingly cites to the *PaintCare* and *Association of California Insurance Companies* cases to imply that it can largely ignore the "exact provisions" of Penal Code section 30900, subdivision (b) (*i.e.*, the authorizing statute delineating the nature and scope of DOJ's APA exemption) and, thus, enact regulations that have virtually nothing to do with the provisions of section 30900, subdivision (b) without going through the APA process. According to DOJ, this is because it is authorized to "fill up the details" of the statutory scheme due to the fact that "[t]here is no requirement that the authorizing statute set forth every component of an agency's implementing regulations."[16] For many reasons, DOJ is wrong.

For one, the *PaintCare* and *Association of California Insurance Companies* cases only deal with a government agency's authority to enact regulations *under the APA rulemaking process*. They do not deal with an agency's authority to exaggerate the scope of an APA exemption by enacting regulations *outside of the APA rulemaking process*. DOJ's reading of those cases would nullify the rule that "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA."[17] So if there is any doubt as to whether one of DOJ's proposed regulations is outside the scope of DOJ's APA exemption (section 30900(b)(5)), we must *necessarily* conclude that the APA's requirements *do* apply to that regulation, that DOJ cannot shoehorn that regulation under its APA exemption, and that DOJ must enact that regulation through the regular APA rulemaking process.

Second, DOJ's cites to those cases erroneously imply that the groups opposing its regulations would not even accept regulations that are reasonably related or necessary to the registration process, unless they were expressly listed in Penal Code section 30900. This couldn't be further from the truth. Rather, CRPA and NRA contend that a number of DOJ's proposed regulations are neither reasonably, nor in any way, related to the registration process as outlined in Penal Code section 30900, subdivision (b)(5). *Obviously*, nobody expects Penal Code section 30900 to list in detail every single regulation that DOJ is allowed to implement under its APA exemption. And nobody has ever disputed the fact that DOJ can (and must) adopt a variety of regulations "for the purpose of implementing [subdivision (b) of section 30900]."[18]

Both *PaintCare* and *Association of California Insurance Companies* confirm that a government agency can only adopt regulations that are reasonably related to the authorizing statute and that do not conflict with existing statutory law.

Importantly,

> **An administrative agency "has only as much rulemaking power as is invested in it by statute."** (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299, 105 Cal.Rptr.2d 636, 20 P.3d 533; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391, 211 Cal.Rptr. 758,

[16] DOJ's May 4th Letter, page 1.
[17] *California School Boards Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1328, *as modified on denial of reh'g* (Aug. 24, 2010) (internal citations and quotation marks omitted).
[18] Pen. Code, § 30900(b)(5).

> 696 P.2d 150.) **Regulations that are inconsistent with a statute, alter or amend it, or enlarge or impair its scope are void.** (*Carmel Valley Fire Protection Dist., supra*, at p. 300, 105 Cal.Rptr.2d 636, 20 P.3d 533; *Association for Retarded Citizens, supra*, at p. 391, 211 Cal.Rptr. 758, 696 P.2d 150.) . . . In determining whether the Legislature has authorized [a government agency] to exercise its rulemaking power to implement [a regulation], "we first ' "scrutinize the actual words of the statute, giving them a plain and commonsense meaning." ' [Citation.]"[19]

Therefore, contrary to its suggestion, DOJ does not have nearly unfettered authority to bypass the APA in proposing regulations under the exemption provided by Penal Code section 30900, subdivision (b)(5). DOJ is still limited to adopting regulations *only* "for the purpose of implementing [subdivision (b) of section 30900]."[20] Further, even assuming it qualified for the APA exemption, any proposed regulation still cannot be "inconsistent with a statute, alter or amend it, or enlarge or impair its scope."[21] DOJ does not—and cannot—cite to anything that contradicts these important rules.

The series of citations regarding statutory interpretation on page 6 of DOJ's May 4th Letter do nothing to advance DOJ's arguments. DOJ cites to these cases, one after the other, without showing exactly how they apply to the scope of the APA exemption found in Penal Code section 30900, subdivision (b)(5). DOJ simply concludes, without any analysis or explanation, that "Our approach comports with past judicial decisions."[22]

In the end, despite DOJ's misguided efforts, the following rules still stand, and they cannot be ignored:

1) Generally, "[i]f a rule constitutes a 'regulation' within the meaning of the APA ... it may not be adopted [or] amended . . . except in conformity with 'basic minimum procedural requirements' [of the APA] that are exacting."[23] Any regulation that substantially fails to comply with these requirements can be judicially declared invalid.[24]

2) Even if there is some debate on whether a proposed regulation relates to an exemption to the APA, "*any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*" and against applicability of the APA exemption.[25]

3) An administrative agency "has only as much rulemaking power as is invested in it by statute."[26]

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[19] *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305–06, *review denied (May 13, 2015)* (emphasis added); *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, 390–91.
[20] Pen. Code, § 30900(b)(5).
[21] *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305–06, *review denied (May 13, 2015).*
[22] DOJ's May 4th Letter, page 6.
[23] *California School Boards Ass'n, supra,* 186 Cal.App.4th at 1328, internal citations and quotation marks omitted).
[24] *California School Boards Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1328, *as modified on denial of reh'g* (Aug. 24, 2010) (internal citations and quotation marks omitted).
[25] *Id. (*emphasis added).

4) Regardless of whether an exemption to the APA applies, "***an agency does not have the authority to alter or amend a statute or enlarge or impair its scope***."[27]

III. A NUMBER OF THE REGULATIONS PROPOSED BY DOJ EXCEED THE SCOPE OF PENAL CODE § 30900(b) AND MUST, THEREFORE, BE ADOPTED UNDER THE APA TO BE VALID

A number of DOJ's proposed regulations are neither relevant to, nor reasonably necessary for, the implementation of the registration scheme delineated in Penal Code section 30900, subdivision (b), *i.e.*, the registration scheme applicable *only* to firearms that are newly-designated as "assault weapons" by AB 1135 and SB 880. Some seek to create or amend a whole host of definitions for "assault weapon" features and other terms, as well as regulate activities after the registration process.

As a result, these proposed regulations exceed the scope of the APA exemption provided by Penal Code section 30900, subdivision (b)(5) and, thus, cannot be implemented without adhering to the formal APA rulemaking process. Because DOJ seeks to implement them without substantially complying with the requirements of the APA rulemaking process, these proposed regulations are invalid.[28]

A. The APA Exemption Stated in Penal Code Section 30900(b)(5) Does Not Extend to the 44 Definitions DOJ Proposes or to DOJ's Corresponding Attempt to Require the Registration of "Bullet-Button" Shotguns

DOJ's May 4th Letter misleadingly suggests that DOJ can provide definitions for any term used in the identification of *any* type of "assault weapon" (*i.e.*, even those "assault weapons" that were in no way affected by AB 1135 and SB 880) without satisfying the APA. But, Penal Code section 30900, subdivision (b) does not give DOJ such carte blanche authority.

Penal Code section 30900, subdivision (b)(1) expressly states that the APA exemption stated in subdivision (b)(5) only applies to the registration of "an assault weapon that does not have a fixed magazine, *as defined in Section 30515*[.]"[29] So Penal Code section 30515 *already* provides the definitions needed for the registration at issue. And the *only* "assault weapons" within section 30515 that do "not have a fixed magazine" are the *rifles* and *pistols* referenced in Penal Code section 30515, subdivisions (a)(1) and (a)(4). These firearms comprise the newly defined category of "assault weapons" implemented by AB 1135 and SB 880. DOJ can only propose regulations pertaining to *these* "assault weapons" for purposes of registration by using the definitions provided by Penal Code section 30515; DOJ cannot propose regulations for any other type of "assault weapon" (or any other firearm for that matter) if it refuses to go through the APA rulemaking process, much less change the definitions for those firearms.

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[26] *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305–06, *review denied (May 13, 2015).*
[27] *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1236 (emphasis added).
[28] *See California School Boards Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1328, *as modified on denial of reh'g* (Aug. 24, 2010) (internal citations and quotation marks omitted).
[29] Pen. Code, § 30900(b)(1) (emphasis added).

So, DOJ's APA exemption applies only to regulations that solely concern:

1. The *registration procedures*
2. for the *newly defined* category of "assault weapons" implemented by AB 1135 and SB 880.

Significantly, both of these criteria must be satisfied for a proposed regulation to be exempt from the APA requirements. For instance, DOJ cannot bypass the APA when implementing a regulation that pertains to the registration process for a firearm that was not affected by AB 1135 and 880 (but attempts to do just that, as discussed below). And DOJ cannot bypass the APA when implementing a regulation that has absolutely nothing to do with the registration process, even if the regulation might pertain to a firearm that was affected by AB 1135 and 880 (which DOJ also attempts to do, as discussed below).

Also, there is no indication that currently-existing definitions are in any way insufficient to identify the "assault weapons" that can be registered pursuant to Penal Code section 30900, subdivision (b). After all, not much has changed since DOJ registered thousands of firearms in 2000. It bears repeating that ***the Legislature did not change any terms relating to the definition of "assault weapon" aside from changing the phrase "capacity to accept a detachable magazine" to "does not have a fixed magazine***. And there is nothing in the text of Penal Code sections 30515, 30680, or 30900, or the text of AB 1135 and SB 880, suggesting that DOJ needs to make the additional definitions that are being objected to by this letter. DOJ did not need to make most of these additional definitions in 2000 to identify the group of "assault weapons" that could be registered back then (and the definitions that DOJ did make were made after extensive public comment via the APA process), and it does not need to make such definitions now.

Accordingly, if DOJ just uses the valid, currently-existing definitions, then it will not have to worry about the concerns it mentioned in its May 4th Letter:

- having "the same definitions used to determine whether a weapon must be registered under the AWCA to also be used to determine whether a weapon constitutes an assault weapon for other purposes under the AWCA"[30]

- having "uniform definitions across the statutory scheme" that "would eliminate any gap between the weapons that are registered and the weapons that are exempt from the prohibition on possession."[31]

- "[t]he consequence of limiting the registration definitions to the registration process[, which] would be the application of different definitions to different portions of the AWCA"[32]

Furthermore, the very fact that DOJ has concerns that definition changes will impact other provisions of the *AWCA* is telling. It *proves* that DOJ's proposed definitions are not just limited to registration of the

[30] DOJ's May 4th Letter, page 4.
[31] DOJ's May 4th Letter, page 5.
[32] DOJ's May 4th Letter, page 6.

firearms affected by AB 1135 and SB 880. For instance, how exactly do DOJ's proposed definitions (purportedly) applying to:

(1) "the weapons [that are not registered] that are exempt from the prohibition on possession[,]"[33]
(2) unrelated, "different portions of the AWCA"[34] that have nothing to do with registration, and
(3) "whether a weapon constitutes and assault weapon for *other* purposes [besides registration purposes] under the AWCA[,]"[35]

have *anything* to do with the definitions needed to register firearms under Penal Code section 30900, subdivision (b)?

And, even though DOJ emphatically alludes to the inconsistency of having two separate systems of definitions, these allusions are meaningless because DOJ never shows why there would be any inconsistencies or dual systems if it simply left the current definitions unchanged, or, assuming it can, if it simply limited its changes to definitions that *only* have to do with the registration of the newly-designated "assault weapons."

When the currently-existing definitions *already* establish what needs to be registered under Penal Code section 30900, subdivision (b)—as they do here—there is no need to define what does *not* need to be registered, *i.e.,* the weapons "that are exempt from the prohibition on possession," the weapons governed by "different portions of the AWCA," and the weapons that meet the "assault weapon" definition but cannot be registered under section 30900, subdivision (b).

These are all arguments that the CRPA and NRA made in their January 9, 2017 letter (and restated below) that DOJ fails to address. Why is DOJ going through all the unnecessary work of conjuring new definitions that have nothing to do with the registration scheme described by Penal Code section 30900, subdivision (b)? And if these terms are so necessary, why didn't DOJ take the time from December (when the original regulations were proposed) to the present to properly seek public comment through the standard APA procedures? Most of the issues highlighted by the CRPA and NRA back in January could have been addressed by now. Inexplicably, DOJ is proposing the same list of 44 new definitions for "assault weapon" terms that it proposed in December 2016, and it still insists that it wants all of them implemented without going through the APA.[36]

In addition, DOJ's unnecessary definitions are making previously legal firearms now illegal and changing the rules (*e.g.*, as to what can be registered) without any notice to Californians. Therefore, the provisions of the AWCA would, in effect, be applied retroactively and prevent people from registering firearms that they should be able to register. In other words, by changing these definitions now, after the new "assault weapon" law has already gone into effect, DOJ is causing the provisions of "the AWCA [not to be] applie[d] prospectively[,]" in contrast to what the AWCA allows and is preventing

[33] DOJ's May 4th Letter, page 5.
[34] DOJ's May 4th Letter, page 6.
[35] DOJ's May 4th Letter, page 4 (emphasis added)
[36] Cal. Code Regs. tit. 11, § 5470 (proposed).

the "grandfathering in [of] the possession of previously-owned weapons."[37] This is improper in its own right.

If the Legislature intended to allow DOJ free reign to amend every single existing definition possibly relating to "assault weapons," especially those for "assault weapon" terms completely unaffected by AB 1135 and SB 880, it would have clearly said so. It did not. There is no discussion of definition changes in the legislative history, other than the Legislature's decision to define "assault weapon" in Penal Code section 30515 pursuant to AB 1135 and SB 880 and to expressly state in subdivision (b)(1) that this is the definition at issue when it comes to the new registration process. Accordingly, the Legislature gave DOJ a limited APA exemption for registration procedures for the firearms that AB 1135 and SB 880 transformed into "assault weapons" on January 1, 2017. So, at most, DOJ's APA exemption only extends to proposed definitions relating to the newly-designated "assault weapons" (*i.e.*, those without a fixed magazine), if those definitions are needed for registration. And DOJ cannot exploit its APA exemption to redefine terms for purposes of illegally altering, amending, enlarging, and impairing portions of the Penal Code in ways that the Legislature never contemplated when it adopted AB 1135 and SB 880. As such, the following proposed regulations, which have zero to do with firearms meeting the new definition of "assault weapon," are especially improper must go through the APA process or be rejected as void.

1. Many of DOJ's Proposed Definitions, Including, but Not Limited to, Those for "Flash Suppressor," "Pistol Grip," "Threaded Barrels," and "Shotguns," Cannot be Implemented Because They Are Not Exempt from APA Review

Due to all the reasons stated above, DOJ cannot shoehorn these proposed definitions under its APA exemption. Most notably, these terms have nothing to do with the magazine release, the only aspect of the definition of "assault weapon" definition that has been changed by AB 1135 and SB 880. Again, the Legislature did not change any terms relating to the definition of "assault weapon" aside from changing the phrase "capacity to accept a detachable magazine" to "does not have a fixed magazine." So why change, expand, and/or redefine any of the other terms used to define "assault weapon," which have been in effect for almost 20 years and which *were* adopted under the APA? There is no justification.

Further, DOJ's May 4th Letter fails to address why or how an amendment, clarification, or revision of existing terms and definitions is needed in order to facilitate the so-called identification of "assault weapons," much less the identification of the newly-designated "assault weapons" for registration purposes.

Therefore, there is no need for DOJ to now expand or clarify the definitions of terms like "flash suppressor," "pistol grip," "threaded barrels," "shotguns," etc. The proposed definitions that DOJ submitted for these and other terms should be rejected, and DOJ should, at the very least, be required to abide by the APA rulemaking process if it wants to implement these definitions.

[37] *See* DOJ's May 4th Letter, pages 2 and 4 (stating "The AWCA is not a strict prohibition on assault weapons, because its provisions have only applied prospectively, to prohibit the new entry of assault weapons on the market" and that "the AWCA applies prospectively")

2. Proposed Sections 5470(d) and 5471(a) Cannot be Implemented Because They Are Not Exempt from APA Review and Because They Conflict with Existing Law, Which Does Not Contemplate Shotguns as Part of the New "Assault Weapon" Definition

As discussed above, AB 1135 and SB 880 only changed the definitions of "assault weapon" for certain rifles and pistols, based on their magazine function.[38] Nothing in the Code changed for shotguns, including for "[a] semiautomatic shotgun that has the ability to accept a detachable magazine."[39] The Legislature left shotguns untouched when adopting AB 1135 and SB 880. Specifically, AB 1135 and SB 880 were meant to:

> revise th[e] definition of "assault weapon" to mean a semiautomatic centerfire *rifle*, or a semiautomatic *pistol* that does not have a fixed magazine but has any one of those specified attributes. The bill[s] [were also meant to] define "fixed magazine" to mean an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.[40]

The Legislature is presumed to have *intentionally* revised the definition of "assault weapon" for pistols and rifles while leaving the definition of "assault weapon" for shotguns unchanged: "As a general rule, when a legislature 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion.'" [41]

Yet, proposed section 5471, subdivision (a)[42] states that, for purposes of the definition of "assault weapon" given in Penal Code section 30515, "'[a]bility to accept a detachable magazine' means with respect to a semiautomatic *shotgun*, it does not have a fixed magazine."[43] DOJ seeks to re-write Penal Code section 30515 against the Legislature's intentions, essentially replacing the phrase "that has the capacity to accept a detachable magazine" with the phrase "that does not have a fixed magazine" for *shotguns*. In other words, shotguns with "bullet buttons" are now "assault weapons" not by legislative change, but by DOJ's action alone.

This is improper because shotguns with "bullet buttons" are not "assault weapons" under the new, or any, law. Under the relevant parts of current California law, only a shotgun that has the ability

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[38] Pen. Code, § 30510(a)(1), (a)(4), and (b).
[39] Pen. Code, § 30515(a)(7).
[40] AB 1135, 2015-2016 Leg., Reg. Sess. (Cal. 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1135 (last visited June 13, 2017) (emphasis added); SB 880, 2015-2016 Leg., Reg. Sess. (Cal. 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB880 (last visited June 13, 2017) (emphasis added).
[41] *Gaines v. Fidelity Nat. Title Ins. Co.* (2016) 62 Cal.4th 1081, 1113 (citing *Russello v. United States* (1983) 464 U.S. 16, 23).
[42] Entitled "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Explanation of Terms Related to Assault Weapon Designation."
[43] Cal. Code Regs. tit. 11, § 5471(a) (proposed) (emphasis added).

to accept a detachable magazine is an "assault weapon."[44] Under current California regulations, a shotgun with a "bullet button" does not have the capacity to accept a detachable magazine because a tool is required to remove the magazine.[45] Therefore, as of the writing of this letter, shotguns with "bullet buttons," by definition, are not "assault weapons."

And DOJ's justification for finding otherwise is nonsensical. On page 6 of DOJ's May 4th Letter, it writes that AB 1135 and SB 880 require the registration of "bullet-button" shotguns because of the following language in Penal Code section 30900, subdivision (b)(1):

> Any person who, from January 1, 2001, to December 31, 2016, inclusive, lawfully possessed an *assault weapon* that does not have a fixed magazine, *as defined in Section 30515*, *including* those [assault] weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool, shall register the firearm before January 1, 2018, but not before the effective date of the regulations adopted pursuant to paragraph (5), with the department pursuant to those procedures that the department may establish by regulation pursuant to paragraph (5).[46]

DOJ claims that the phrase "weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool" encompasses shotguns. But it fails to point out that first those firearms must be considered "assault weapons." And shotguns with "bullet buttons" are not now and have never been "assault weapons."

DOJ, not the California Legislature, is making a whole class of firearms "assault weapons." *For that reason alone, proposed sections 5470(d) and 5471(a) are void*. Regardless of whether an exemption to the APA applies or not, "an agency does not have the authority to alter or amend a statute or enlarge or impair its scope."[47] DOJ appears to be blind to this fact, stating in its May 4th Letter that it "does not anticipate or intend that the proposed definitions will bring any new weapons within the statutory definition of 'assault weapon,' other than the bullet-button weapons the Legislature intended to be covered."[48] But DOJ does not explain why we are wrong that shotguns should not be included.

3. Proposed Section 5471(d) Should Not Be Allowed to Bypass the APA Rulemaking Process Because DOJ's New Definition for "Barrel Length" Is Irrelevant for the New "Assault Weapon" Definition

A simple reading of Penal Code section 30515 shows that barrel length is irrelevant to the newly-established category of "assault weapons" that needs to be registered under section 30900, subdivision (b). The new category of "assault weapon" is based on magazine function only and has nothing to do with barrel length. For example, a semiautomatic, centerfire rifle that does not have a fixed magazine and a "pistol grip" is still an "assault weapon" under the new law, regardless of whether

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[44] Pen. Code, § 30515(a)(7).
[45] *See* Cal. Code Regs. tit. 11, § 5469(a).
[46] Pen. Code, § 30900(b)(1) (emphasis added).
[47] *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1236 (emphasis added).
[48] DOJ May 4th Letter, page 5.

it has a 20-inch barrel or a 25-inch barrel. Thus, there is no need for DOJ to define "barrel length" for the registration of the newly-defined "assault weapons."

Nevertheless, DOJ's proposed Section 5471, subdivision (d) purports to define "barrel length" without going through the APA.[49] So why is DOJ including a definition of "barrel length" in its proposed regulations for the registration of "Bullet-Button Assault Weapons?"

It seems that DOJ now realizes that some clarification on barrel-length measurement is needed to enforce California law restricting "short-barreled" rifles and shotguns. California law, like federal law, restricts the possession, sale, manufacture, importation, etc. of "short-barreled" rifles and shotguns.[50] Rifles with barrels of 16 inches in length or shorter[51] and shotguns with barrels of 18 inches in length or shorter[52] are considered "short-barreled" and illegal. Currently, however, California has no statute or regulation specifying how to measure a barrel's length for purposes of these restrictions. Recognizing the need to specify how to measure barrel length, DOJ is now attempting to fast-track regulations making such clarification by hiding them among "assault weapon" registration regulations and "borrowing" the latter's APA exemption provided by Penal Code section 30900, subdivision (b)(5).

It is rather disingenuous for DOJ to hide this motive in its May 4th Letter, saying that "[a] weapon's barrel length is a basic piece of identifying information collected for every weapon . . . much like information about a weapon's manufacturer or model."[53] DOJ did not need to define "barrel length" in this way during its previous registration periods for "assault weapons." It has registered hundreds of thousands of other firearms without having a definition for barrel length. Why does it need to define "barrel length" now, especially when the new "assault weapon" law has nothing to do with barrel length?

Likewise, it is disingenuous of DOJ to claim in its May 4th Letter that its proposed definition of "barrel length" is proper due to Penal Code section 11106, subdivision (b). Penal Code section 11106, subdivision (b) just states that

> [t]he Attorney General shall permanently keep and properly file and maintain all information reported to the Department of Justice pursuant to . . . [firearms law] and maintain a registry thereof . . . The registry shall consist of . . . caliber, type of firearm, if the firearm is new or used, barrel length, and color of the firearm[.]

Again, DOJ is essentially claiming that its proposed definition of "barrel length" is merely a basic piece of identifying information collected for every weapon. This couldn't be further from the truth. DOJ seems to forget that nothing under current California or federal law, or even the proposed regulations,

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[49] This is actually a reprint of the federal definition for this term located in the *National Firearms Act Handbook* on pages 5 and 6 of Chapter 2 ("What Are 'Firearms' under the NFA?"). The National Firearms Act is comprised of the sections of the United States Code restricting devices like machineguns, "destructive devices," silencers, and "short barreled" rifles and shotguns. Federal law no longer has an applicable definition of "assault weapon."
[50] *See* Pen. Code, § 33210.
[51] Pen. Code, § 17170.
[52] Pen. Code, § 17180.
[53] DOJ May 4th Letter, p. 10.

prevents the owner of a firearm (even one that meets the definition of an "assault weapon") from changing the firearm's barrel length—unless doing so causes the firearm to become too short for purposes of the restrictions on "short-barreled" rifles or shotguns, or causes a semiautomatic centerfire rifle's overall length to fall under 30 inches. A firearm owner may modify the barrel length the day following registration of the firearm, thus rendering the information provided to DOJ out-of-date. Finally, section 11106 predates the new "assault weapon" definitions, so to suggest that subdivision (b)(5)'s APA exemption extends to it is a stretch.

In the end, it is wholly improper of DOJ to sneak in a regulation for "short-barreled" rifles and shotguns here. It seems like DOJ is hoping that the OAL will simply miss the fact that the Code sections defining, restricting, and regulating "short-barreled" rifles and shotguns are located in different sections unrelated to "assault weapons."[54] DOJ's proposed regulations for "barrel length" *must* go through the APA process, as they have nothing to do with registering a newly classified "assault weapon" under AB 1135 and SB 880. And any doubt as to whether APA requirements apply must be resolved in favor of excluding proposed Section 5471, subdivision (d) from DOJ's limited exemption to the APA.

4. Proposed Section 5471(m) Should Not Be Allowed to Bypass the APA Rulemaking Process Because DOJ's Statements About Magnets Left on the "Bullet-Button" Are Irrelevant for the New "Assault Weapon" Definition Implemented by AB 1135 and SB 880

In the second paragraph of subdivision (m), wherein DOJ defines "detachable magazine," DOJ states:

> An AR-15 style firearm that has a bullet-button style magazine release with a magnet left on the bullet-button constitutes a detachable magazine. An AR-15 style firearm lacking a magazine catch assembly (magazine catch, magazine catch siring and magazine release button) constitutes a detachable magazine. An AK-47 style firearm lacking a magazine catch assembly (magazine catch, spring and rivet/pin) constitutes a detachable magazine.

This second paragraph is of note because it states that leaving a magnet within a "bullet button" constitutes a "*detachable magazine*" and that firearms without magazine catches are also "d*etachable magazines*." But, leaving the magnet within the "bullet button" has nothing to do with the registration requirements or the new definition of "assault weapons" without "*fixed magazines*." This definition is purely for law enforcement purposes. Prior to January 1, 2017, some firearm owners made a claim that the magnet left in the "bullet button" was a "tool," which means that the magazines were not "detachable" and that the firearm did not fall under the "assault weapon" definition. But that argument is moot after 2016 because, with or without the magnet, a rifle or pistol with a "bullet button" and with the other prohibited features is still considered an "assault weapon." This definition has nothing to do with the registration process but is yet another attempt by DOJ to extend the APA exemption to include definitions not necessary for registration. Thus, it should not be allowed to bypass the APA.

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[54] S*ee* Pen. Code, §§ 30600-30680 (governing "assault weapons"); *see also* Pen. Code, §§ 16590, 17700-17800 (governing "short-barreled" rifles and shotguns).

5. Proposed Section 5471(x) Should Not Be Allowed to Bypass the APA Process Because DOJ's Proposed Definition for "Overall Length of Less than 30 Inches" Is Irrelevant for the New "Assault Weapon" Definition

DOJ's May 4th Letter states that a "semiautomatic, centerfire rifle that has an overall length of less than 30 inches" is an "assault weapon."[55] Just like the definition of "assault weapon" for shotguns, this one was also unchanged by AB 1135 and SB 880. For semiautomatic, centerfire rifles with an overall length of less than 30 inches, whether the firearm has a "fixed" magazine has no effect on its classification as an "assault weapon." This means that the characteristic of having an overall length of less than 30 inches is not contemplated by Penal Code section 30900, subdivision (b) because there can be no lawful registering of any such firearms in the new registration period. Thus, whether (or how) a firearm has an "overall length of less than 30 inches" is completely irrelevant to the new "assault weapon" definition, much less to the registration of the new "assault weapons."

What DOJ also fails to mention is that a "semiautomatic, centerfire rifle that has an overall length of less than 30 inches" has been an "assault weapon" *since 2001*.[56] People were able to register such firearms with a length of under 30 inches as "assault weapons" during the year 2001 registration period, and nothing has changed since then. Nobody could lawfully obtain a semiautomatic, centerfire rifle under 30 inches after December 31, 2000 or possess one that was not registered. So there is no need to define "overall length of less than 30 inches" now for the registration of the *newly-defined* "assault weapons."

It appears that DOJ recognizes this fact because its sole justification on page 11 of its May 4th Letter is that the definition of "overall length of less than 30 inches" is needed because it will help DOJ recognize what is *not* a newly-defined "assault weapon" that is subject to registration. That is not the case. This is DOJ redefining, in 2017, a definition of a term used to describe a firearm that was banned in 2001.

DOJ is (again) stretching the APA exemption beyond the realm of "assault weapon" registration for purposes of expanding the scope of firearm restrictions. Such misuse of an APA exemption to further an agenda is improper. And if there is any doubt as to whether this proposed regulation is outside the scope of DOJ's APA exemption, we must *necessarily* conclude that it is and that DOJ must enact that regulation through the regular APA rulemaking process.[57]

B. DOJ's Prohibition on Removal of the Release Mechanism (Proposed Section 5477) Is Invalid Because (1) Penal Code Section 30900(b)(5)'s Exemption to the APA Does Not Extend to Activity Post-Registration and (2) It Contradicts and Enlarges Statutes Governing Restrictions on Registered "Assault Weapons"

Proposed section 5477 would prohibit the removal of the "release mechanism for an ammunition feeding device on an assault weapon pursuant to Penal Code section 30900, subdivision

[55] DOJ May 4th Letter, page 11.
[56] *See* Pen. Code, § 30515(a)(3).
[57] *California School Boards Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1328, *as modified on denial of reh'g* (Aug. 24, 2010) (internal citations and quotation marks omitted).

(b)(1) . . . ***after the assault weapon" is registered***."[58] No doubt DOJ is referring to the removal of the "bullet button," despite the somewhat confusing terms used, like "release mechanism" and "ammunition feeding device," which, ironically, are not defined in DOJ's extensive definition section. Regardless, there is simply nothing in Penal Code section 30900, subdivision (b) that could be construed as exempting DOJ from the APA when regulating what happens *after* the registration process has already been implemented. And the removal of the "bullet button" 10 days or 30 years down the line after registration in no way affects the registration process.

Practically speaking, almost anything could happen to a firearm after it is registered (*e.g.*, modifying the barrel length as discussed above). The exemption to the APA in section 30900 cannot be read as giving DOJ free reign to skip the APA requirements when it comes to the thousands of different circumstances potentially encountered by a firearm after registration. If DOJ is so worried about one of those circumstances being unlawful, DOJ needs to either take it up with the Legislature or propose additional regulations through the APA process. As such, DOJ's APA exemption does not apply to Section 5477. And Section 5477 is invalid.

DOJ's attempts to connect Section 5477 to the registration process ring hollow. On page 8 of its May 4th Letter, DOJ states that "[r]emoval of the bullet-button undermines law enforcement officials' ability to identify the weapon" and "undermines the registration requirement" because it would allow "a firearm owner . . . to substantially alter a weapon or transform it into another type of weapon after it has been registered." DOJ knows how small and inconspicuous a "bullet button" is. Even a trained law enforcement officer would have to physically manipulate the firearm or scrutinize it closely to notice the presence or absence of most "bullet buttons." Contrary to DOJ's assertions, removing the "bullet button" does not alter the appearance of the overall firearm, nor does it alter the other more obvious indicia of a specific firearm like its make, model, and, mostly, its serial number.

Correspondingly, DOJ also fails to consider what law enforcement officers actually do when they check for properly registered "assault weapons." Law enforcement knows that next year, a firearm meeting the definition of an "assault weapon," with or without a "bullet button," must be registered to the possessor or it is a crime. If law enforcement must identify the firearm to see if it is lawfully registered, they enter the make, model, and serial number into the Automated Firearm System ("AFS"). If the firearm is registered to the individual, there is no crime. If it is not registered to the individual, possession of the "assault weapon" is a violation of California law. Whether it has a "bullet button" is not considered. Thus, DOJ's claim that removing the "bullet button" affects law enforcement's ability to identify the firearm is tenuous at best.

Section 5477 is void *on the additional ground* that it stands in direct contradiction to what the Legislature intended for the treatment of "assault weapons" post-registration. As shown by the exceptions the Legislature carved out for registered owners of "assault weapons," it is improper for DOJ to prohibit the removal of the "bullet button" from a firearm after it has already been registered as an "assault weapon." These exceptions (such as Penal Code section 30675, subdivision (c)) apply to the registered owner of an "assault weapon," *regardless* of whether the owner added/removed features to/from the "assault weapon" after registration. A person who possesses and registers, pursuant to Penal Code section 30900, subdivision (b), a firearm meeting the current definition of an "assault weapon" possesses a *registered* "assault weapon." That firearm is now in the system as an "assault weapon"

[58] Cal. Code Regs., tit. 11, § 5477(a) (proposed) (emphasis added).

registered to that individual. As a result, the requirements, restrictions, and exceptions for possessing a registered "assault weapon" apply to that person and that firearm–irrespective of what he or she does with the "bullet button."

In sum, DOJ does not have authority to adopt its proposed Section 5477 even if it went through the APA process, let alone if it just relied on subdivision (b)'s APA exemption.

C. The Eligibility Check Required by Proposed 11 C.C.R. Sections 5476(d) & (e), and the Citizenship Information Required by DOJ as Stated in Proposed Section 5474(a), Are Unrelated to Registration and Have No Statutory Support

1. The Eligibility Check Requirement

Proposed Section 5476, titled "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Processing of Applications," addresses the submission and review of "assault weapon" registration applications. Section 5476, subdivision (d) states:

> Once the Department determines that all necessary information has been received and the firearm qualifies for registration, ***the firearms eligibility check shall commence***. The Department will inform the applicant of the results of the check.

But, whenever background checks are required for firearms in California, the Legislature has adopted *statutes* to expressly authorize DOJ to conduct them.[59] The Legislature does not require, or even refer to, an eligibility or "background check" in the new (or any other) Penal Code sections governing the registration of "assault weapons." In addition, the Legislature has, via statute, authorized DOJ to constantly update who may lawfully possess firearms through the Armed and Prohibited Persons System.[60] If DOJ were now deemed to have authority to require background checks absent statutory authority, these other statutes would be meaningless.

DOJ fails to address any of these points in its May 4th Letter. So if DOJ has greater concerns than the Legislature had (when it drafted and passed AB 1135 and SB 880) about "ensur[ing] that [DOJ] does not accept registrations from persons who have been disqualified or prohibited from possessing or registering [firearms]," DOJ needs to take it up with the Legislature.

In sum, proposed Section 5476, subdivisions (d) and (e) improperly go beyond what is stated by statute and are, therefore, void.

2. The Citizenship Information Required by Proposed Section 5474(a)

As a preliminary matter, DOJ claims that the citizenship information required by proposed Section 5474, subdivision (a) "is reasonably necessary to complete the eligibility check process" because "[c]itizenship information is required to confirm eligibility to possess a firearm under federal law[.]"[61] But, as shown in the preceding section, the proposed eligibility check itself is improper.

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[59] *See, e.g.*, Cal. Penal Code §§ 26710, 28220, 30105, 33865.
[60] *See generally* Pen. Code, §§ 3000-30005.
[61] DOJ May 4th Letter, page 10.

Additionally, asking for citizenship information probably means that DOJ will have to run the background check through the National Instant Criminal Background Check System (NICS).[62] But, it is dubious whether DOJ can legally conduct a full background check under NICS for the mere registration of "assault weapons," as NICS is reserved only for firearm *transactions*.[63]

Regardless, Penal Code section 30900, subdivision (b)(3) is specific as to exactly what personal information is required for registration: "registrant's full name, address, telephone number, date of birth, sex, height, weight, eye color, hair color, and California driver's license number or California identification card number."[64] Section 5474 conspicuously and improperly enlarges the requirements of 30900, subdivision (b)(3) and is, thus, void.

III. A NUMBER OF DOJ'S PROPOSED REGULATIONS RE: "BULLET-BUTTON ASSAULT WEAPONS" ARE INVALID BECAUSE THEY CONFLICT WITH EXISTING LAW

When making regulations, "an agency does not have the authority to alter or amend a statute or enlarge or impair its scope."[65] "It is well established that the rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature. A ministerial officer may not ... under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute. And, a regulation which impairs the scope of a statute must be declared void."[66] If an agency's proposed regulation "is not in harmony with, or in conflict with, existing law, ***the OAL will disapprove of the regulation and prevent it from being adopted***."[67]

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[62] Otherwise, there is no need for the person's immigration status and country of citizenship information. In addition, a background check (through NICS) for "assault weapon" registration is referenced on the CRIS screenshots on page 16 of DOJ'S proposed CFARS Form.

[63] 28 C.F.R. § 25.6 states that:

> (j) Access to the NICS Index for purposes unrelated to NICS background checks required by the Brady Act. Access to the NICS Index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) shall be limited to uses for the purposes of:
> (1) Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives;
> (2) Responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,
> (3) Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

[64] Pen. Code, § 30900(b)(3).

[65] *Interinsurance Exchange of Automobile Club, supra,* 148 Cal.App.4th at 1236.

[66] *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436 (internal quotation marks and citations omitted).

[67] *See In re: Medical Board of California*, OAL Determination Decision of Disapproval of Regulatory

A. DOJ's Refusal to Register Firearms Based on Their Lack of Serial Numbers and Other Information, Even Though They Meet the New Definition of "Assault Weapon," Is in Conflict with Existing Statutory Law

Proposed Section 5472, titled "Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Weapons That Will Not Be Registered as Assault Weapons," specifies which firearms DOJ will not register. This clarifies, in part, that Californians need not register firearms that were considered "assault weapons" under prior "assault weapon" registration laws in effect before January 1, 2017 (subsection (b)) and firearms that are not considered "assault weapons" or disassembled (subsections (c), (d), and (e)). Those provisions are not problematic. But, subdivisions (f) and (g) of section 5472 are, stating:

> (f) The Department will not register as an assault weapon a firearm manufactured by a Federally-licensed manufacturer if the firearm does not have a serial number applied pursuant to federal law.
>
> (g) The Department will not register as an assault weapon a FMBUS [*i.e.*, a Firearm Manufactured by Unlicensed Subject][68] if the firearm does not have a serial number assigned by the Department and applied by the owner or agent pursuant to section 5474.2.

Subdivision (f) precludes from registration firearms manufactured before the requirement that manufacturers place serial numbers on firearms, and subdivision (g) expands the requirements for adding serial numbers, which already exist under California law and which are independent of the registration requirements for "assault weapons."

1. Proposed Section 5472(f) Would Prohibit Registration of Firearms Made Without Serial Numbers by Licensed Manufacturers and Those Firearms That Already Had Markings and Were Registered Under Existing California Law.

There was a time when firearm manufacturers were not required to put serial numbers on firearms. Historically, federal law did not require serial numbers on firearms. The Federal Firearms Act of 1938, 152 Stat. 1250, the first federal law to regulate commerce in firearms, imposed no duty to mark firearms with serial numbers. Serial numbers by manufacturers and importers were required for the first time in 1958, except that they were not required for shotguns and .22 caliber rifles.[69] Serial numbers on all firearms were not required until enactment of the Gun Control Act of 1968.[70] Federal law has never required serial numbers on firearms made by persons other than manufacturers and importers. *It is not unlawful under federal or California law to possess a firearm without a serial number*. Yet, DOJ outright refuses to accept the registration of these firearms, in contrast to what Penal Code sections 30515, 30680, and 30900 say about registration being allowed for any firearm lawfully-possessed before January 1, 2017. DOJ's proposed action contradicts existing law requiring registration

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Action, OAL File No. 2014-0827-02 S (October 15, 2014) (emphasis added).

[68] DOJ defines "FMBUS" in proposed Section 5471(s) as "a Firearm Manufactured by Unlicensed Subject."

[69] 26 C.F.R. § 177.50 (1958).

[70] P.L. 90-618, 82 Stat. 1213, 1223.

of "assault weapons," and it exceeds the registration requirements of the Penal Code. DOJ does not have such regulatory authority.

Furthermore, DOJ's concerns about the identification of the firearm appear insincere because DOJ had heretofore, for purposes of previous and current firearm registrations, fully accepted markings on firearms based on a lower standard than what Proposed Section(f) requires. DOJ had processed those registrations with no questions asked. For instance, Penal Code section 28000, in part, allows for the registration of a firearm when a person (1) obtains it through an exemption from section 27545 (requiring firearms to be transferred through a licensed firearm dealer); or (2) is otherwise not required by law to report acquisition, ownership, destruction, or disposal of a firearm.[71] And California law currently allows for, and DOJ accordingly accepts, the application to register a firearm that an individual personally makes. This is done through the use of the "Firearm Ownership Report" form.[72] Firearm owners currently, and have in the past, used the "Firearm Ownership Report" form to register their homemade firearms with the state. Included in these registrations are firearms that meet the new definition of "assault weapon." DOJ had no problem in the past accepting registration of firearms through this method and neither California, nor DOJ, at that time imposed any of the rigorous marking requirements set forth in the proposed regulations. Firearm owners were able to provide identification marks engraved or installed on their firearms and submit them to DOJ under this standard. We know of no instances where DOJ in the past refused to accept the registrations for these firearms. Not only do DOJ's regulations contradict California law by asking for markings of firearms which exceed current California law, but they also exceed what DOJ has accepted for years.

2. DOJ's Creation of a Serial Number Scheme Exceeds the APA Exemption for Registering "Assault Weapons"

Pursuant to section 5472, subdivision (g), DOJ will refuse to register an "assault weapon" manufactured by a "FMBUS" (i.e., an unlicensed individual) unless he or she complies with the serial number application requirements of section 5474.2. This proposed regulation is void because it conflicts with both existing statutes and statutes that have not taken effect. The proposed regulation exceeds the requirements of the recently-enacted sections from AB 857 (2016) and other sections of the Penal Code (as described below) pertaining to the application for a DOJ-provided serial number pursuant to Penal Code section 23910.

To reiterate, under California law, Californians can lawfully make their own firearms, and they are able to do this without having to put a serial number on their firearm. Also, California law (separate from registration of "assault weapons") already allows for the application of a serial number.[73] Under this law, there is no specific requirement as to how a serial number must be engraved/attached to the firearm. But, with section 5472, subdivision (g), DOJ prescribes the specific requirements for doing so, making definitive determinations above the scope of the statute governing serial numbers. While DOJ may arguably have the authority to make such a rule after going through the formal APA process, it

[71] Pen. Code, § 28000.
[72] A copy of this form may be found at https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/volreg.pdf (Last visited June 7, 2017). Note the website address uses the term "volreg." This is an abbreviation for "voluntary registration" and is often how people, including DOJ, refer to this form.
[73] Pen. Code, § 23910.

certainly does not have the authority to bypass the APA when altering a statute that applies beyond just "assault weapon" registration.

Also, the Legislature passed AB 857 last year, requiring Californians to add a serial number to homemade firearms and certain other firearms lacking serial numbers.[74] For firearms falling under this requirement, serial numbers provided by DOJ would need to be added to the firearm before January 1, 2019.[75] Additionally, those who want to make their own firearm *after* July 1, 2018 must: (1) request a serial number before completing the firearm and (2) add the number soon after the completion of the firearm.[76] Thus, under AB 857, both individuals with existing firearms and those who wish to manufacture their own firearm must apply to DOJ for the unique serial number or other mark of identification and engrave it according to the standards set forth in federal law *after* July 1, 2018.[77]

Not only does DOJ add nothing new, but its proposed regulations also affirmatively cause problems by being inconsistent with existing law. Specifically, Proposed Section 5474.2, subdivision (a)(3)(B)—in contrast to AB 857 and other areas of California law—requires "*certain additional information*" (*i.e.*, information in addition to the serial number) to be stamped on the firearm.[78]

California statutory law–even with the strict provisions added by AB 857–does not require this much information to be engraved, casted, or otherwise placed on the firearm; the engravement, stamping, or placement of the *serial number* alone suffices. Presumably, DOJ borrowed this heightened engraving/stamping standard from federal law (for licensed firearm manufacturers and importers who have the machinery and capability to comply with these requirements). Regardless, the fact remains that California's Legislature knowingly chose *not* to require the engraving/placing of additional information beyond the serial number. This means that DOJ's proposed regulations improperly enlarge or impair the statutory scope intended by the Legislature.[79]

Ultimately, all that Section 5474.2 does is cause more, unnecessary problems for Californians who wish to comply with the law. Those individuals who sought and applied serial numbers under the existing standard would have to *re-apply and re-engrave* their serial number and additional markings pursuant to 5474.2's specifications. Also, the regulation specifies that a federally licensed firearm manufacturer (commonly referred to as an "07" licensee) is required to engrave the firearm. This is

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[74] Pen. Code, §§ 29180-29184.
[75] Pen. Code, § 29180(c).
[76] Pen. Code, § 29180(b).
[77] Pen. Code, § 29180(b)(2) and (c)(2). Federal law requires licensed manufacturers and importers to identify their firearms "[b]y engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on the frame or receiver thereof an individual serial number. The serial number must be placed in a manner not susceptible of being readily obliterated, altered, or removed, and must not duplicate any serial number placed by you on any other firearm. For firearms manufactured or imported on and after January 30, 2002, the engraving, casting, or stamping (impressing) of the serial number must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch..." (27 C.F.R § 478.92(a)(1)(I).)
[78] Failure to abide by these marking requirements will cause DOJ to deny the registration of the "assault weapon." (Cal. Code Regs., tit. 11 § 5474.2(a)(4) (proposed).
[79] *Interinsurance Exchange of Automobile Club, supra,* 148 Cal.App.4th at 1236 ("an agency does not have the authority to alter or amend a statute or enlarge or impair its scope.")

incorrect. A federally licensed gunsmith/dealer (commonly referred to as an "01") may do the engraving.[80] But, DOJ creates further problems because current California law requires either the 07 or 01 to have a "Dangerous Weapon" Permit to do this work because the firearms in question are "assault weapons." Without such a permit, the firearms could not be lawfully taken to or left with a firearm manufacturer/dealer/gunsmith. Doing so would cause the firearm owner and licensee to violate the restrictions on transferring and possessing "assault weapons." That there are very few "Dangerous Weapon" Permit holders in California underscores why the Legislature did not make this a requirement.

DOJ should not be allowed to change that with proposed 11 C.C.R. Sections 5472, subdivision (g) and 5471.2, subdivision (a)(3)(B).

B. Proposed Section 5477(c) (Requirement for Clear Digital Photos) Requires Access to Photography Equipment that Is Not Required Under the Penal Code

Section 5477, subdivision (c) is inconsistent with the Penal Code in that it makes as a prerequisite to "assault weapon" registration, access to fairly expensive digital equipment (not just computer and internet access, as DOJ claims in its May 4th Letter). Section 5477, subdivision (c) states:

> *Clear digital photos* of firearms listed on the application. One photo shall depict the bullet-button style magazine release installed on the firearm. One photo shall depict the firearm from the end of the barrel to the end of the stock if it is a long gun or the point furthest from the end of the barrel if it is a pistol. The other two photos shall show the left side of the receiver/frame and right side of the receiver/frame. These locations are typically where firearms are marked when manufacturing is complete. At the discretion of the Department the last two photos shall be substituted for photos of identification markings at some other locations on the firearm.[81]

This exceeds the requirements of the Penal Code. The Legislature, as mentioned above, laid out the information required for registration of an "assault weapon." Included in that information is a "*description*" of the firearm, not a *depiction*. There is nothing in the Penal Code or elsewhere in the regulations that require a registrant to provide pictures of a firearm. It is also unnecessary for the registration of the firearm. This was never a requirement when firearms were required to be registered as "assault weapons" in 2000.

Moreover, under the requirements of Section 5477, subdivision (c), an individual who wants to register her firearm as an "assault weapon" needs to purchase, borrow, and/or find the digital camera that would allow her to take "clear digital photos" of the firearm and to send the photos to DOJ. This is highly problematic for many people, ranging from low-income individuals who cannot afford access to such equipment to elderly individuals who may know how to operate it. The members of the Legislature clearly did not intend to have the ownership and operation of digital devices be a barrier to firearm registration and ownership or they would have added it to the requirements for registration.

[80] *See* ATF Rul. 2009-1
[81] Cal. Code Regs., tit. 11, § 5477(c) (proposed) (emphasis added).

C. Proposed 11 C.C.R. Section 5474.1 Improperly Narrows the Statutory Definitions of "Family" and "Acceptable Forms of Proof of Address"

Section 5474.1 is void because it improperly limits the scope of permissible joint registrations of "assault weapons" under California law by narrowly defining who are "family members residing in the same household."[82] Existing California law does not limit that broad phrase, so DOJ's proposed scope, definitively limiting who qualifies, is in conflict with California law. DOJ further narrows the scope of joint registration by limiting the acceptable forms of proof to show that the members indeed reside in the same household. This has severe consequences, as joint registration is of vital importance for "assault weapon" law.

Penal Code section 30955 provides:

> The department's registration procedures shall provide the option of joint registration for any assault weapon or .50 BMG rifle owned by family members residing in the same household.

This law is unchanged by the recent "assault weapon" legislation. But DOJ, through section 5474.1, takes it upon itself to limit who should be considered a "family member," absent any intention by the Legislature to so limit that term.

DOJ, in proposed Section 5474.1, entitled "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Joint Registration of Assault Weapons," requires all of the following in order for a firearm to be jointly registered:

1) One family member must be identified as the primary registrant,

2) The name and relationship of each joint registrant must be provided,

3) All joint registrants must have been 18 years old by December 31, 2017, and

4) Joint registration is only authorized for the following family relationship:

   (a) Spouse
   (b) Parent to Child
   (c) Child to Parent
   (d) Grandparent to Grandchild
   (e) Grandchild to Grandparent
   (f) Domestic Partner
   (g) Siblings[83]

There are many different family dynamics that DOJ either does not consider or refuses to recognize. DOJ's narrow view of what constitutes a "family" clearly lays outside the scope of the Penal Code, which allows "family members residing in the same household" to register "assault weapons."

[82] *See Bearden, supra,* 138 Cal.App.4th at 436 (internal quotation marks and citations omitted).
[83] Cal. Code. Regs, tit. 11, § 5474.1(a), (b) (proposed).

DOJ does not stop there. It also requires "proof of address" for *each* joint registrant in order to register "assault weapons."[84]

Acceptable forms of proof of address are (only) as follows:

(l) Carry Concealed Weapon (CCW) Permit

(2) Curio and Relic (C & R) Federal firearm license with name and address

(3) Utility Bill: Cable, electricity garbage, gas, propane, alarm/security or water bill with purchaser's name on it and dated within three months of application for registration.

(4) Military permanent duty station orders indicating assignment within California; (active duty military spouse ID is not acceptable).

(5) Property Deed: Valid deed or trust for the individual's property or a certificate of title

(6) Resident Hunting License

(7) Signed and dated rental agreement/contract or residential lease

(8) Trailer certification of title

(9) DMV Vehicle Registration

(10) Certificate of Eligibility, as defined in section 4031, subdivision (g) of Chapter 3.[85]

Nothing in the Code so limits the scope of acceptable proof of address in the manner that DOJ seeks to do. Also of note, this information is not required from a person who is *not* jointly registering an "assault weapon." The "proof of residence" requirement acts as an additional bar to joint registration that the Legislature never intended.

In other words, DOJ unilaterally "compels that to be done which lies without the scope of [California's joint registration laws] and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of [said law]. And, a regulation which impairs the scope of a statute must be declared void."[86] Therefore, Section 5474.1 is invalid.

[84] Cal. Code. Regs, tit. 11, § 5474.1(c) (proposed).
[85] Cal. Code Regs., tit. 11 § 5474.1(c) (proposed).
[86] *Bearden, supra,* 138 Cal.App.4th at 436 (internal quotation marks and citations omitted).

IV. A NUMBER OF DOJ'S PROPOSED REGULATIONS RE: "BULLET-BUTTON ASSAULT WEAPONS" ARE ALSO INVALID ON THE BASIS THAT THEY ARE UNCLEAR

As further explained below, the following proposed provisions cannot be approved for publication because they are not sufficiently clear as the law demands:

- The definition of "contained in," as stated in proposed Section 5471, subdivision (k);
- The amendment to the definition of "flash suppressor," as stated in proposed Section 5471, subdivision (r);
- The requirement for a description of the firearm that uniquely identifies it, as stated in proposed Section 5474, subdivision (b); and
- DOJ's photography requirements, as stated in proposed Section 5474, subdivision (c)

These provisions suffer from more than one clarity deficiency listed in Title 1, C.C.R. section 16, subdivision (a), which means that the OAL cannot approve them for publication. They also violate the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution, which require "a reasonable degree of certainty in . . . criminal law . . . ."[87]

Undoubtedly, these regulations are confusing to persons of ordinary intelligence who are directly affected by them. And they will likely invite arbitrary and capricious action by DOJ and law enforcement because they are too vague to provide adequate notice of the conduct proscribed or prescribed, or to provide sufficiently definite guidelines for enforcement. The law deems as void such vague regulations that fail to be clear.[88] On both legal and practical grounds, therefore, DOJ's regulations should not be moved forward for official adoption.

A. Legal Standard re: the "Clarity" Standard for Regulations

Agencies must draft regulations "in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style . . . ."[89] Accordingly, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.[90] A regulation is drafted with "clarity" when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[91]

In examining a proposed regulation for compliance with the "clarity" requirement, the OAL

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[87] *People v. Heitzman* (1994) 9 Cal.4th 189, 199 (quoting *In re Newbern* (1960) 53 Cal.2d 786, 792).)
[88] *In re: re: Air Resources Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-0202-05 SR (March 27, 2001); *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391.
[89] Gov. Code, § 11346.2(a)(1).)
[90] *See* Gov. Code, § 11349.1(a)(3).
[91] Gov. Code, § 11349(c). Cal. Code Regs., tit. 1, § 16(b) defines what persons are presumed to be "directly affected" by a regulation.

must presume that the regulation does not comply with the required "clarity" standard if any of the following conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or

(2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or

(3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or

(4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or

(5) the regulation presents information in a format that is not readily understandable by persons "directly affected"; or

(6) the regulation does not use citation styles which clearly identify published material cited in the regulation.[92]

"An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void."[93] Therefore, if the OAL finds that an agency's proposed regulation "is vague and does not meet the clarity standard[,]" the regulation will be disapproved and the agency will be prevented from moving forward with the regulation.[94]

B. Legal Standard re: the Void for Vagueness Doctrine Based on Due Process Concerns

> [T]he underlying concern [of the void for vagueness doctrine] is the core due process requirement of adequate notice. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115.) That the terms . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a [law that] either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its

[92] Cal. Code Regs., tit. 1, § 16(a).
[93] *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.
[94] *In re: re: Air Resources Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-0202-05 SR (March 27, 2001); *see In re: Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 2012-0918-04 S (November 6, 2012); *see In re: Department of Social Services*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-1231-01 S (February 21, 2002).

> meaning and differ as to its application, violates the first essential of due process of law.[95]

To pass constitutional muster when facing a vagueness challenge, a law must pass two separate and distinct tests: (1) it must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" and (2) it must do so "in a manner that does not encourage arbitrary and discriminatory enforcement." [96]

Accordingly, DOJ's proposed regulations must clearly define the behavior that is being regulated so that persons of ordinary intelligence can understand them, and they must provide sufficient standards to prevent arbitrary and discriminatory enforcement by authorities.

C. Proposed Section 5471(k) Is Unclear as to What "Contained In" Means as that Term Is Used in the Penal Code's Definition of "Fixed Magazine"

Section 5471, subdivision (k) should be presumed unclear because "the regulation uses language incorrectly" and "presents information in a format that is not readily understandable by persons 'directly affected[.]'"[97] Section 5471, subdivision (k) states:

> "Contained in" means that the magazine cannot be released from the firearm while the action is assembled. For AR-15 style firearms this means the magazine cannot be released from the firearm while the upper receiver and lower receiver are joined together.

DOJ is defining the term "contained in" purporting to "clarify" what that term means within the definition of "fixed magazine" stated by Penal Code section 30515, subdivision (b).[98] Instead, DOJ causes more confusion. Penal Code section 30515, subdivision (b) defines "fixed magazine" as:

> For purposes of this section, fixed magazine" means an ammunition feeding device *contained in*, or permanently attached to[99], a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.[100]

To any person, DOJ's definition of "contained in" is nonsensical in its intended context of clarifying the statutory definition of "fixed magazine." It appears as if DOJ is basically saying that a fixed magazine is "an ammunition feeding device [that the magazine cannot be released from the firearm while the action is assembled], or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action." Even assuming this is DOJ's

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[95] *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391.
[96] *Kolender v. Lawson* (1983) 461 U.S. 352, 357.
[97] Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).
[98] *See* Cal. Code Regs., tit. 11, § 5471 (proposed) ("For purposes of Penal Code section 30515 and this Chapter the following definitions shall apply . . .").
[99] In its proposed regulations, DOJ states that "'permanently attached to' means the magazine is welded, epoxied, or riveted into the magazine well." (Cal. Code Regs., tit. 11, § 5471, subd. (w) (proposed).)
[100] Pen. Code, § 30515, subd. (b) (emphasis added).

intention, it is confusing and nonsensical because of the doubling of the concept "cannot be removed without disassembly of the firearm action." DOJ's garbled, grammatically-incorrect definition and regulation would befuddle anyone. Consequently, section 5471, subdivision (k) is woefully unclear and should be rejected as void.

D. Proposed Section 5471(r) Is Unclear as to What Devices Can Satisfy DOJ's Definition of "Flash Suppressor"

In addition to exceeding the scope of the exception to the APA given by Penal Code section 30900, DOJ's definition of the term "flash suppressor" is too vague to be understood by persons directly affected by the regulation. Section 5471, subdivision (r) should be presumed unclear because "the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning[.]"[101] Also, the regulation "uses terms which do not have meanings generally familiar to those 'directly affected' by the regulation, and those terms are defined neither in the regulation nor in the governing statute[.]"[102] Section 5471, subdivision (r) reads:

> "Flash suppressor" means any device attached to the end of the barrel, that is designed, intended, or functions to *perceptibly reduce or redirect muzzle flash* from the shooter`s field of vision. A hybrid device that has either advertised flash suppressing properties or functionally has flash suppressing properties would be deemed a flash suppressor. A device labeled or identified by its manufacturer as a flash hider would be deemed a flash suppressor.[103]

DOJ provides no guidance as to what extent the flash suppressor must "perceptibly reduce" muzzle flash. The term "perceptibly reduce" is not a term of art within the firearm community, so DOJ needed to have defined it in order to imbue that term with any purposeful meaning. As is, one might think that a device reducing the muzzle flash by 20% suffices while another might think that it has to be 50% or more. So, section 5471, subdivision (r), on its face, can be reasonably and logically interpreted to have more than one meaning. This means, among other things, that a person of ordinary intelligence cannot understand its meaning and that it encourages arbitrary and discriminatory enforcement. Thus, it is unconstitutionally vague.

Similarly, DOJ provides no guidance as to what angle a device must "redirect flash muzzle from the shooter's field of vision" in order for it to be deemed a "flash suppressor." Is an angle of 2 degrees sufficient, or does the angle have to be greater than 30 degrees? Nobody–not even DOJ apparently–knows. Because this information is not established, it allows DOJ to arbitrarily or capriciously enforce "assault weapon law," with different DOJ agents deeming different devices to be "flash suppressors" and surprising Californians who were denied DOJ's views of the law, due to the ambiguous language of 11 C.C.R. section 5471, subdivision (r).

E. Proposed Section 5474(mm) Is Unclear as to What Type of Modifications Must be Made to a Folding or Telescoping Stock for It to be Considered "Fixed"

[101] Cal. Code Regs., tit. 1, § 16(a)(1).
[102] Cal. Code Regs., tit. 1, § 16(a)(3).
[103] Cal. Code Regs., tit. 11, § 5471(r) (proposed) (emphasis added).

In subdivision (mm), DOJ states that "'[s]tock, fixed' means a stock that does not move, fold, or telescope." However, it is unclear based on this definition what type of modification must be made to a folding or telescoping stock for it to be considered "fixed." For example, it cannot be ascertained from DOJ's language whether the modification can be temporary or whether it must be "permanent." And, if the latter, it is unclear what would suffice (*i.e.* riveted, welded, or glued). Thus, subdivision (mm) necessarily must be revised before it can be implemented.

F. Proposed Section 5474(c) Is Unclear as to Exactly What Type of Photographs Must Be Submitted to Register "Assault Weapons"

Section 5474, subdivision (c) should be presumed unclear because "the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning"[104] and it "uses terms [*e.g.*, relating to photography] which do not have meanings generally familiar to those 'directly affected' by the regulation, and those terms are defined neither in the regulation nor in the governing statute[.]"[105] Section 5474, subdivision (c) reads:

> *Clear digital photos* of firearms listed on the application. One photo shall depict the bullet-button style magazine release installed on the firearm. One photo shall depict the firearm from the end of the barrel to the end of the stock if it is a long gun or the point furthest from the end of the barrel if it is a pistol. The other two photos shall show the left side of the receiver/frame and right side of the receiver/frame. These locations are typically where firearms are marked when manufacturing is complete. At the discretion of the Department the last two photos shall be substituted for photos of identification markings at some other locations on the firearm.

Subdivision (c) is horribly written. Aside from the fact that it requires the firearm owner to own and operate a digital camera, it is missing contextual information and definitions that are critically needed to allow a person to understand its requirements.

What constitutes a "clear digital phot[o]" appears to be up to DOJ's discretion. The size of the picture, distance from where these pictures are taken, location or background of the photo shoot, and contrast, focus, and resolution of the image are all not established. The regulation does not reference or provide exemplars of "clear" photos.

The requirement that the photo depict the firearm from barrel to stock for long guns, or from barrel to "the point furthest from the end of the barrel" for pistols, leaves open a multitude of angles, distances, and depictions from which DOJ can designate as satisfactory. It is unknown whether DOJ will reject registrations on the basis that it deems pictures inadequately clear or incorrectly positioned.

Further, DOJ asks for two additional pictures, one from the left side of the receiver/frame and one from the right side. However, "[a]t the discretion of the Department the last two photos shall be substituted for photos of identification markings at some other locations on the firearm." The syntax and word choice of this last sentence make it hard to decipher. It seems as if DOJ is saying that, at its own discretion, it may substitute these photos for identification from some other location, or that it can

[104] Cal. Code Regs., tit. 1, § 16(a)(1).
[105] Cal. Code Regs., tit. 1, § 16(a)(3).

accept (as substitution) photos of identification markings at some other location on the firearm beside the receiver/frame. Again, what that means and what other photos DOJ shall "substitute" allows DOJ to abuse its wide discretion. Because proposed Section 5474, subdivision (c) is so vague that it confuses persons of common intelligence, invites arbitrary and discriminatory enforcement, and violates ordinary notions of fair play and the settled rules of law, it must be rejected.

V. DOJ'S PROPOSED FORMS ENTITLED "CALIFORNIA FIREARMS APPLICATION REPORTING SYSTEM (CFARS)" AND "NEW SERIAL NUMBER APPLICATION (BOF 1008)" CANNOT BE ISSUED BECAUSE THEY HAVE ELEMENTS THAT EXCEED THE SCOPE OF PENAL CODE § 30900, ARE IN DIRECT CONFLICT WITH EXISTING LAW, AND ARE DETRIMENTALLY UNCLEAR

All of the arguments made in Sections I through IV, *supra*, against DOJ's proposed regulations also apply to DOJ's translation and application of them for its proposed forms (*i.e.*, the regulation's functional counterpart or re-statement on the forms). Some additional problems plague the proposed forms, as discussed below.

A. The "New Serial Number Application (BOF 1008)" Form

This Form conflicts with Fifth Amendment protections because it compels the applicant to testify as to whom he or she acquired the firearm from. "The Fifth Amendment states that '[n]o person ... shall be compelled . . . to be a witness against himself. To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled.'"[106]

By requiring a registrant to disclose, under penalty of perjury, where he or she obtained a firearm, if it was transferred to the registrant without going through a licensed firearm dealer (and without an exception to that requirement), the form is essentially forcing the applicant to admit failure to comply with the applicable provisions of the Penal Code requiring that private party transfers be conducted through a licensed dealer. Because this non-compliance is a crime, this means that the "New Serial Number Application (BOF 1008)" Form would be compelling the applicant to be a witness against himself, contrary to the provision of the Fifth Amendment.[107] This is improper, and the "New Serial Number Application (BOF 1008)" Form should be revised so that it no longer violates Fifth Amendment rights.

B. The CFARS Form

For the same reasons, the CFARS Form likewise conflicts with the Fifth Amendment because it compels the applicant to testify under penalty of perjury as to whom he or she acquired the firearm from, and from where the firearm was acquired (see Page 10 of DOJ's CFARS Form).

Secondly, page 8 of the CFARS Form contradicts Penal Code sections 30680 and 30900 when it states that "[s]hotguns should be semi automatic or have a revolving cylinder" in order to be registered under Penal Code section 30900. As mentioned in Section III.A.1, *supra*, regulation of shotguns by DOJ exceeds DOJ's APA exemption because the new "assault weapon" definition does not contemplate

[106] *People v. Kurtenbach*, 204 Cal.App.4th 1264, 1283-84 (2012) (internal citation and quotation marks omitted).

[107] *See* U.S.C.A.Const. Amend. 5; *see, e.g., Russell v. United States*, 306 F.2d 402 (9th Cir. 1962).

shotguns at all. No shotguns—regardless of whether or how they meet the "assault weapon" definition under Penal Code section 30515—must be registered as an "assault weapon" at this time. As such, the CFARS Form states the law erroneously and must be fixed.

Even more inexplicable is that none of DOJ's proposed regulations even hint that a shotgun with a revolving cylinder can be registered, likely because DOJ knows they cannot legally be registered. It is unclear why DOJ is now saying on the CFARS Form that such a shotgun can be registered. This invites people to unwittingly admit to DOJ that they possess an illegal firearm while believing that it is not a problem. As a result, the phrase "[s]hotguns should be semi automatic or have a revolving cylinder" should be stricken from page 8 of the CFARS Form. Similarly, DOJ should take out any option for "revolving cylinder" in the "Magazine" pull-down menu located on page 10 of the Form.

Thirdly, DOJ expands "assault weapon" law when it states on page 8 of the CFARS Form that it "will not process registrations for firearms that are currently in law enforcement custody. You must be in lawful possession of the firearm." This is in direct contrast to the provisions of Penal Code section 30680, which indicate that the only factor of "lawful possession" that can be considered when determining registrability is whether "[t]he person lawfully possessed that assault weapon prior to January 1, 2017."[108] Thus, DOJ is statutorily obligated to register all firearms meeting the other two requirements of Penal Code section 30680,[109] if those firearms were lawfully possessed prior to January 1, 2017. Whether those firearms are currently in the possession of law enforcement is completely irrelevant to registration. The sole test for "lawful possession" is whether they were in lawful possession *before* January 1, 2017, not whether they are in lawful possession after January 1, 2017. Thus, DOJ needs to strike the phrase "[t]he Department will not process registrations for firearms that are currently in law enforcement custody. You must be in lawful possession of the firearm."

Fourthly, as explained in Section III.A, *supra*, DOJ's refusal to register firearms due to their lack of serial numbers is in conflict with existing law. Consequently, DOJ should remove from page 8 of the CFARS Form the entire bulleted paragraph about serial numbers, including the assertion that "[t]he Assault Weapon Registration cannot be submitted until such time the Department issued serial number has been engraved and permanently affixed to the firearm."

Fifthly, DOJ's requirements on the CFARS Form for joint registration go against both existing law and common sense. Based on the way that DOJ drafted the CFARS Form and the example it constructed (see page 9 where both registrants register the firearm), it appears that both parties to a joint registration must fill out and complete the registration form for the joint registration to work. This runs counter to the fact that "joint" means "common to two or more" and "sharing with another[.]"[110] Based on the ordinary and contemporary meaning of "joint" and how it is used in other legal applications, most people will assume that only one registration form needs to be filled out for both people. And there appears to be no reason why DOJ is requiring two completed forms. The fact that DOJ is

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[108] Pen. Code, § 30680(b).

[109] The other two requirements are that "[p]rior to January 1, 2017, the person was eligible to register that assault weapon pursuant to subdivision (b) of Section 30900" and that "[t]he person registers the assault weapon by January 1, 2018, in accordance with subdivision (b) of Section 30900." Pen. Code, § 30680(a), (c).

[110] MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/joint (last visited June 1, 2017).

misconstruing the term "joint" and requiring two registration forms will unnecessarily cause many joint registrants to get denied based on a needless procedural hindrance.

DOJ should only require one completed registration form for both parties to a joint registration. In addition, it is unknown why DOJ is requiring joint registrants to provide residency information when DOJ does not require this from single registrants. Certainly, there is no existing law authorizing DOJ to do this. And, it is also unclear by DOJ's language on the CFARS Form how many times the registration fee should be paid if there are joint registrants. If it is truly "joint" registration of a single firearm, then they should only pay once. It seems like this is the direction DOJ is leaning toward as well, but it is currently unclear. Therefore, DOJ should promptly remedy these critical defects pertaining to joint registration, and the CFARS Form should not be allowed to be published in its current state.

Furthermore, DOJ should amend the CFARS Form on page 10 so that the "Category" pull-down menu does not allow any option but "semiautomatic." Otherwise, the CFARS Form would conflict with Penal Code sections 30680 and 30515, subdivisions (a)(1) and (a)(4), which collectively state that only semiautomatic rifles and pistols can be registered now as "assault weapons."

Also on page 10, DOJ should either ensure that it has every "make" and "model" listed in the corresponding pull-down menus or include an option for "other." Otherwise, DOJ would be effectively barring individuals from registering firearms that they have a right to register simply because they cannot find an appropriate option in the pull-down menus.

Moreover, page 10 on the CFARS Form seems to show that DOJ forgot entirely that certain pistols can be registered as "assault weapons." For example, the "Additional Firearm Characteristics" boxes that the DOJ allows registrants to check only apply to rifles, as delineated in Penal Code section 30515, subdivision (a)(1). But the "additional firearm characteristics" for pistols as delineated in Penal Code section 30515, subdivision (a)(4) appear to be missing.

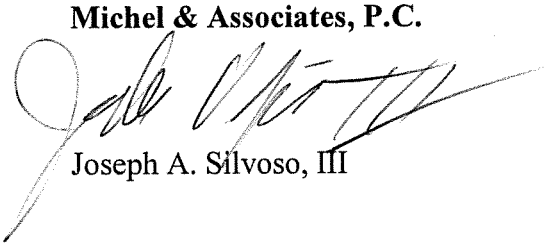
Lastly, DOJ should allow registrants to provide the date *to the best of their recollection* for the fields on the CFARS Form requiring them to provide information about the exact date (to the day) that they acquired the firearm, the source from whom they acquired the firearm, and the location from where they acquired the firearm. The majority of firearm owners honestly do not know these data points for their firearms because they are not required to know them or keep track of them. It would be inequitable and impractical to force them to provide a definitive answer under "penalty of perjury" (see page 16). By requiring this information, DOJ is either forcing individuals to commit perjury or effectively preventing the registration of newly-defined "assault weapons" by owners who forgot all the small details of their firearm's acquisition (and which California law does not require them to remember). Because the Penal Code does not make "memory of firearm acquisition details" a prerequisite to "assault weapon" registration under Penal Code section 30900, the DOJ's requirements are legally improper. Therefore, DOJ should revise the CFARS Form so that it allows registrants to provide information to the best of their recollection. This would also alleviate the perjury concerns currently plaguing the CFARS Form.

VI. CONCLUSION

DOJ's proposed regulations and forms for "Bullet-Button Assault Weapons" (*i.e.*, OAL Regulatory Action Number 2017-0512-02FP) are unlawful. And they are riddled with other flaws that

make their administration, interpretation, and enforcement highly problematic. Allowing these regulations to be implemented would cause irreparable harm to countless thousands of Californians and subvert the basic minimum procedural requirements that the APA was enacted to protect. Thus, DOJ should not be allowed to implement its proposed regulations for "Bullet-Button Assault Weapons" as they are currently constructed. We look forward to the OAL and DOJ's cooperation and hope litigation will not be necessary to address our clients' concerns. If you have any questions, please do not hesitate to contact us.

Sincerely,
Michel & Associates, P.C.



Joseph A. Silvoso, III

180 East Ocean Boulevard • Suite 200 • Long Beach • California • 90802
Tel: 562-216-4444 • Fax: 562-216-4445 • www.michellawyers.com