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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF FRESNO**

DANNY VILLANUEVA, NIALL
STALLARD, RUBEN BARRIOS,
CHARLIE COX, MARK STROH,
ANTHONY MENDOZA, and
CALIFORNIA RIFLE & PISTOL
ASSOCIATION, INCORPORATED

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity
as Attorney General for the State of
California, STEPHEN LINDLEY, in his
official capacity as Chief of the California
Department of Justice, Bureau of Firearms;
CALIFORNIA DEPARTMENT OF
JUSTICE, and DOES 1-10,

Defendants.

Case No.: 17CECG03093

[Assigned for All Purposes to the Honorable
Judge Mark Snauffer; Dept.: 501]

**NOTICE OF ERRATA REGARDING
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Action Filed: September 7, 2017

1 Plaintiffs Danny Villanueva, Niall Stallard, Ruben Barrios, Charlie Cox, Mark Stroh,
2 Anthony Mendoza, and California Rifle & Pistol Association, Incorporated hereby submit this
3 notice of errata regarding the Memorandum of Points and Authorities in Support of Plaintiffs'
4 Motion for Preliminary Injunction filed January 5, 2018.

5 The Table of Contents and headings were incorrectly numbered. Attached herewith as
6 Exhibit A is an Amended Memorandum of Points and Authorities in Support of Plaintiffs' Motion
7 for Preliminary Injunction. No other changes have been made.

8
9 Dated: January 8, 2018

MICHEL & ASSOCIATES, P.C.

10
11 /s/Sean A. Brady
12 Sean A. Brady
13 Attorneys for Plaintiffs
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EXHIBIT A

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Defendants.

Case No.: 17CECG03093

[Assigned for All Purposes to the Honorable
Judge Mark Snauffer; Dept.: 501]

**AMENDED MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Hearing Date: January 30, 2018
Hearing Time: 3:30 PM
Judge: Mark Snauffer
Department: 501

Action Filed: September 7, 2017

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 California recently enacted new laws amending the definition of “assault weapon” thereby
4 bringing numerous firearms within that term’s scope that had previously not been. Those new
5 laws require any owner of such firearms, if lawfully acquired between January 1, 2001, and
6 December 31, 2016, to register them with the California Department of Justice (“DOJ”) by July 1,
7 2018, in order to maintain their possession. The legislature tasked DOJ with formulating
8 regulations to implement the registration scheme and exempted DOJ from California’s otherwise
9 mandatory procedures for making regulations in doing so under the Administrative Procedure Act
10 (“APA”).

11 DOJ, however, interpreted that very narrow exemption as an invitation for it to bypass the
12 formal rulemaking process in adopting a whole slew of regulations for “assault weapons” that had
13 tenuous, if any, connections to registration procedures. Plaintiffs will be irreparably harmed by
14 being forced to comply with illegal regulations to simply maintain lawful possession of their
15 property. Because these regulations were not adopted lawfully, they are void and Plaintiffs bring
16 this motion to enjoin their enforcement before the fast approaching registration window closes
17 forever. To be clear, Plaintiffs do not dispute DOJ’s authority to make regulations concerning
18 “assault weapons” per se. In fact, Plaintiffs do not challenge many of the related regulations DOJ
19 adopted. Rather, they contend that the regulations DOJ adopted without adhering to the APA are
20 not within the scope of the APA exemption the legislature conferred on DOJ. Moreover, DOJ
21 adopted regulations that, even if they were exempt from the formal rulemaking process, are void
22 because they unlawfully expand or restrict the scope of a statute.

23 **STATEMENT OF FACTS**

24 The APA provides a detailed statutory scheme for state agencies when proposing and
25 adopting regulations. (See Gov. Code, §§ 11340 et seq.) Mandatory procedures under the APA
26 include providing adequate notice of proposed regulations to the public and an opportunity for
27 public comment before their adoption. (Gov. Code, §§ 11346.2, 11346.4, 11346.5, 11346.8.)

28 On July 1, 2016, Governor Brown signed into law Senate Bill 880 (“SB 880”) and

1 Assembly Bill 1135 (“AB 1135”). (Sen. Bill. No. 880 (2015-2016 Reg. Sess.); Ass. Bill. No.
2 1135 (2015-2016 Reg. Sess.)) These bills are identical and amended the definition of “assault
3 weapon” under Penal Code section 30515. *Id.* Specifically, they changed the definition of a
4 semiautomatic, centerfire rifle with certain features as being an “assault weapon” if it had a
5 “detachable magazine” to one if it “does not have a fixed magazine.” (Pen. Code, § 30515, subd.
6 (a)(1).) They made the same definitional change for semiautomatic pistols with certain features.
7 (Pen. Code, § 30515, subd. (a)(4).) But they left the definitions for various shotguns deemed
8 “assault weapons” untouched. *See* (Pen. Code, § 30515, subs. (a)(6)-(8).)

9 SB 880 and AB 1135 also added Subdivision (b) to Penal Code § 30900, which requires
10 that any person who lawfully possesses a newly classified “assault weapon” register it before July
11 1, 2018, “pursuant to those procedures that the [DOJ] may establish by regulation . . .” (Pen.
12 Code, § 30900, subd. (b)(1).) Subdivision (b) further requires registrations to be submitted via the
13 internet, that they contain a “description” of the firearm and information regarding from whom
14 the firearm was acquired, and “the registrant’s full name, address, telephone number, date of
15 birth, sex, height, weight, eye color, hair color, and California driver’s license or identification
16 card number.” (Pen. Code, §§ 30900, subd. (b)(2-3).) Additionally, it allows DOJ to charge a fee
17 for the registration. (Pen. Code, § 30900, subd. (b)(4).) No other requirements or restrictions for
18 the registration of newly classified “assault weapons” are mentioned in Subdivision (b).

19 DOJ is exempt from the APA in “adopt[ing] regulations for the purpose of implementing
20 this subdivision [Subdivision (b)].” (Pen. Code, § 30900, subd. (b)(5).) On December 30, 2016
21 DOJ first submitted proposed regulations purporting to implement Subdivision (b) to the Office of
22 Administrative Law (“OAL”) as “File and Print”—meaning exempt from the APA. (Req. for Jud.
23 Not. ¶ 2.) The proposal included, among other provisions, over 40 new definitions¹ (the majority
24 of which are not related to the changes of the definition of an “assault weapon” under AB 1135 or
25 SB 880), the repeal and replacement of existing definitions for terms relating to “assault
26 weapons” that were lawfully adopted pursuant to APA rulemaking requirements,² expansion of

27 ¹ Cal. Code Regs, tit. 11, § 5471.

28 ² Cal. Code Regs, tit. 11, § 5469.

1 the definition of an “assault weapon” to apply to certain shotguns not classified as an “assault
2 weapon” by California law,³ requirements that certain firearms first have a DOJ-approved serial
3 number inscribed on them as a condition of registration,⁴ requirements that individuals provide
4 personal information beyond what is called for by statute (including U.S. citizenship
5 documentation and “clear digital photograph” of the firearms to be registered),⁵ restrictions on
6 joint-registration,⁶ and a requirement that registrants agree to hold DOJ harmless “for any
7 indirect, incidental, special, or consequential damages” suffered as a result of registering a
8 firearm.⁷

9 Because these provisions either have nothing to do with procedures for “assault weapon”
10 registration, and thus do not qualify for Subdivision (b)’s APA exemption, or improperly expand
11 or curtail statutes, counsel for Plaintiff CRPA submitted a letter to DOJ demanding that they be
12 withdrawn from OAL’s consideration. (RFJN, Exh. “C”.) While DOJ did just that, on May 15,
13 2017, it resubmitted a second set of proposed “File and Print” regulations to OAL, which were
14 substantively identical to the first set along with a cover letter purporting to justify their file and
15 print status. (RFJN, Exhs. “D” & “E”.) CRPA’s counsel again objected. (RFJN, Exh. “F”.) This
16 time, on June 26, 2016, OAL rejected DOJ’s proposal. (RFJN, Exh. “G”.) DOJ then submitted a
17 third set of proposed “File and Print” regulations to OAL, on July 21, 2017, which were again
18 substantively identical to the original proposals, with the only change being a clarification that
19 DOJ considered its proposed definitions for “assault weapons” terms to only apply for the
20 purposes of registration. (RFJN, Exh. “H”.) Without explanation, OAL approved this third set of
21 regulations without explanation, which are now in effect. (RFJN, Exh. “I”.)

22 Plaintiffs are individuals who either own firearms deemed “assault weapons” under SB
23 880 and AB 1135 and wish to register them, but do not wish to be forced to comply with DOJ’s
24 illegal regulations or who own shotguns that DOJ is improperly deeming “assault weapons” and
25

26 ³ Cal. Code Regs, tit. 11, § 5471, subd. (d).

27 ⁴ Cal. Code Regs, tit. 11, §§ 5472, subds. (f)-(g); 5474.2.

28 ⁵ Cal. Code Regs, tit. 11, §§ 5474, subds (a) & (c); 5478, subd. (a)(2).

⁶ Cal. Code Regs, tit. 11, § 5474.1, subds (b)-(c).

⁷ Cal. Code Regs, tit. 11, § 5473, subd. (b)(1).

1 do not want to register them, (Villanueva Decl. in support of MPI, ¶5; Stallard Decl. in support of
2 MPI, ¶¶ 5-6; Barrios Decl. in support of MPI, ¶5; Cox Decl. in support of MPI, ¶5; Stroh Decl. in
3 support of MPI, ¶5; Mendoza Decl. in support of MPI, ¶¶ 5-6.), and an organization representing
4 countless members in the same situations. (Travis Decl. in support of MPI.) Plaintiffs wish to
5 protect their rights under the APA, as this is not an isolated incident. DOJ’s Bureau of Firearms
6 “BOF” has demonstrated a pattern of APA abuses over the years by failing to adopt necessary
7 regulations, exceeding its regulatory authority, or otherwise directly contradicting California law
8 on multiple occasions. (Brady Decl. in support of MPI.) Plaintiffs fear it will only get worse.

9 And, Plaintiffs have been vindicated in their concerns by DOJ itself. On November 24,
10 2017, DOJ published a notice of proposed rulemaking to adopt a new regulation for definitions of
11 terms for identifying “assault weapons” as described in Penal Code section 30515.⁸ The proposal
12 would simply apply the definitions of terms included in Cal. Code Regs, tit. 11, § 5471—which
13 was adopted on a File and Print basis—to the identification of “assault weapons” for all purposes
14 under Penal Code section 30515. In other words, DOJ will be imposing definitions on Plaintiffs
15 that were not adopted in compliance with the APA for law enforcement purposes, not just for
16 registration, as DOJ misleadingly asserts.

17 For these reasons, Plaintiffs bring this action to prevent more of BOF’s regulatory abuses.
18 And, they specifically bring this motion because time is running out. Come July 1, 2018, BOF
19 will have gotten away with it, again.

20 Plaintiffs bring this action seeking review of these regulations adopted by DOJ. Here, as
21 shown above, subdivision (b)’s APA exemption only applies to regulations implementing its
22 provisions, which are restricted to: (1) registration procedures; (2) the process requiring
23 registration submissions via the internet; (3) the requirements for providing description and
24 source information of the firearm as well as personal information of the individual registrant; and
25 (4) the registration fee.

26
27 ⁸ California Department of Justice, *Notice of Proposed Rulemaking*,
28 <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/notice-proposed-rulemaking-11-17.pdf>?
(Nov. 17, 2017).

1 None of these challenge regulations reasonably relate to any of these four provisions, or to
2 the extent that they do, they *illegally* expand or contract the scope of the statutes they purport to
3 implement. In short, DOJ is overreaching its authority and placing Plaintiffs in the untenable
4 position of having to decide whether to give up their rights and their property or place themselves
5 in criminal jeopardy. DOJ should be stopped.

6 **ARGUMENT**

7 **I. LEGAL STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF**

8 “The general purpose of a preliminary injunction is to preserve the status quo pending a
9 determination on the merits of the action.” *SB Liberty, LLC v. Isla Vista Ass’n, Inc.* (2013) 217
10 Cal.App.4th 272, 280. In evaluating whether a preliminary injunction should be granted, the
11 Court must evaluate two interrelated factors: (1) the likelihood that plaintiffs will succeed on the
12 merits of the claims; and (2) the harm that plaintiffs are likely to suffer if the preliminary
13 injunction does not issue, balanced against the harm that the defendant is likely to suffer if it does.
14 (*Cohen v. Bd. of Supervisors* (1985) 40 Cal.3d 277, 286.) While plaintiffs must prove the
15 likelihood that they will suffer immediate and irreparable harm due to the inadequacy of other
16 remedies, (*Triple A Machine Shop, Inc. v. California* (1989) 213 Cal.App.3d 131, 138), the Court
17 should be guided by a “mix” of the potential-merit and interim-harm factors; the greater
18 plaintiff’s showing on one, the less must be shown on the other to support an injunction. (*Butt v.*
19 *State of California* (1992) 4 Cal.App.4th 668, 678; *King v. Meese* (1987) 43 Cal.3d 1217, 1226-
20 1228). Accordingly, the court has discretion to issue a preliminary injunction where a plaintiff
21 demonstrates a high likelihood of success on the merits, even if the plaintiff is unable to show that
22 the balance of harm tips in his or her favor. *SB Liberty, LLC v. Isla Vista Ass’n, Inc.* (2013) 217
23 Cal.App.4th 272, 280.

24 **II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

25 Plaintiffs assert prima facie claims that regulations adopted by DOJ without adhering to
26 the APA’s mandates do not qualify for the limited exemption from the APA that the legislature
27 conferred on it or improperly expand or conflict with existing state laws and are thus void. The
28 APA prohibits state agencies from enforcing any regulation that is not adopted in compliance

1 with its mandates, unless the agency is specifically exempted from having to do so by the
2 legislature. (*Winzler & Kelly v. Dept. of Indus. Relations* (1981) 121 Cal.App.3d 120, 126-127;
3 see also *United Sys. of Ark. v. Stamhon* (1998) 63 Cal.App.4th 1001, 1010 [“When the Legislature
4 has intended to exempt regulations from the APA, it has done so by clear, unequivocal
5 language.”].) Agencies have “only as much rulemaking power as is invested” to them “by
6 statute.” (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal. 4th 287, 299.)
7 And any doubts as to the APA’s applicability should be resolved in favor of the APA applying.
8 (*Engelmann v. State Board of Education* (1991) 2 Cal. App. 4th 47, 59.) Additionally, any
9 regulation that is inconsistent with, alters or amends, or enlarges or impairs a statute’s scope is
10 void. (*Carmel Valley Fire Protection Dist.*, supra, at p. 300.)

11 Any person may seek a judicial declaration as to the validity of any regulation by bringing
12 an action for declaratory relief. (Gov. Code, §11350, subd. (a).) Plaintiffs bring this action
13 seeking review of these regulations adopted by DOJ. Here, as shown above, subdivision (b)’s
14 APA exemption only applies to regulations implementing its provisions, which are restricted to:
15 (1) registration procedures; (2) the process requiring registration submissions via the internet; (3)
16 the requirements for providing description and source information of the firearm as well as
17 personal information of the individual registrant; and (4) the registration fee.

18 None of these challenge regulations reasonably relate to any of these four provisions, or to
19 the extent that they do, they *illegally* expand or contract the scope of the statutes they purport to
20 implement. In short, DOJ is overreaching its authority and placing Plaintiffs in the untenable
21 position of having to decide whether to give up their rights and their property or place themselves
22 in criminal jeopardy. DOJ should be stopped.

23 **A. Improper Deletion of Prior Lawfully Enacted Regulations**

24 11 CCR section 5469 deleted existing regulations that were previously lawfully adopted in
25 compliance with the APA. These regulations provided definitions for the terms “detachable
26 magazine,” “flash suppressor,” “forward pistol grip,” “pistol grip that protrudes conspicuously
27 beneath the action of the weapon,” and “thumbhole stock.” They were subjected to APA
28

1 rulemaking proceedings and underwent extensive revisions prior to being officially adopted.⁹
2 More importantly, they were not limited to mere registration. (11 C.C.R. § 5469 (repealed).)

3 Former Section 5469 applied these definitions “to terms used in the identification of
4 assault weapons pursuant to Penal Code section 30515.” (Ibid.) Nevertheless, Defendants deleted
5 these definitions without going through the APA by relying on Subdivision (b). But Subdivision
6 (b) only concerns regulations for the purposes of registration. As such, its exception does not
7 extend to repealing definitions for another statute, Section 30515.

8 **B. New Definitions**

9 Included with DOJ’s regulations are over 44 definitions for various terms relating to
10 firearms. (11 C.C.R. § 5471.) Subdivision (b)’s APA exception, however, only applies to the
11 registration procedures for assault weapons as defined in Penal Code section 30515. And the
12 enacted definitions are neither relevant to, nor reasonably necessary for, the implementation of the
13 registration scheme delineated in Subdivision (b). For this reason, the definitions exceed the scope
14 of DOJ’s APA exemption, and thus cannot be implemented without adhering to the formal APA
15 rulemaking requirements.

16 Because the APA exception only applies to the registration of “an assault weapon that
17 does not have a fixed magazine, *as defined in Section 30515*,” Penal Code section 30515 *already*
18 provides the definitions needed for registration. (Pen. Code, § 30900, subd. (b)(1) (emphasis
19 added).) And because the only firearms that do “not have a fixed magazine” are those specific
20 *rifles* and *pistols* reference in subdivisions (a)(1) and (a)(4) of Penal Code section 30515, there is
21 no need to provide definitions for terms used to identify firearms that cannot be registered—as
22 Defendants have done here.

23 Except for the term “fixed magazine” (now *statutorily* defined), the Legislature did not
24 change any of the definitions for terms within the AWCA. In fact, the definitions of terms found
25 in the AWCA have remained unchanged and in use for nearly twenty years, nor is there any
26

27 ⁹ A copy of the “Final Statement of Reasons,” which summarizes the rulemaking proceedings for
28 each of these definitions, is available on the California Attorney General’s website at
<https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/fsor.pdf>.

1 indication that they are insufficient to identify “assault weapons” that can be registered pursuant
2 to Subdivision (b). The Legislature simply modified the language of the phrase “capacity to
3 accept a detachable magazine” to now read “does not have a fixed magazine.” (Pen. Code, §§
4 30515, subd. (a)(1), 30515, subd. (a)(4).)

5 Defendants’ unnecessary definitions also make previously legal firearms now illegal to
6 possess without *any* notice to California gun owners. This means that provisions of the AWCA
7 are being applied *retroactively*, in contrast to Defendants own statements and what the AWCA
8 allows with regards to the “grandfathering in [of] the possession of previously-owned weapons.”
9 (Req. for Jud. Not. ¶ 5.) If the Legislature intended to allow DOJ free reign to amend every
10 possible term relating to “assault weapons,” especially those completely unaffected by AB 1135
11 and SB 880, it would have expressly stated as much. It did not, and as a result DOJ cannot
12 shoehorn these definitions into the APA exception.

13 What’s more, many of these definitions are wholly irrelevant to the newly-classified
14 “assault weapons” that must be registered pursuant to Subdivision (b). For example, the definition
15 for the term “barrel length” has no impact on whether or not a firearm is classified as an “assault
16 weapon” pursuant to Penal Code section 30515, subdivision (a)(1) or (a)(4). Rather, it appears
17 DOJ is attempting to define the term for the purposes of California’s restrictions on “short-
18 barreled” rifles and shotguns. (See Pen. Code, §§ 33210-33320.) Even so, definitions for terms
19 not found in subdivision (a)(1) and (a)(4) concern firearms which *cannot* be registered as “assault
20 weapons,” and are being enacted purely for law enforcement purposes only. Not the registration
21 scheme contemplated by Subdvision (b). And as explained below, DOJ’s definitions illegally
22 expand the definition of “assault weapon” to apply to certain shotguns.

23 As a result, the regulations providing new definitions for terms relating to “assault
24 weapons” expand the scope of DOJ’s APA exception, nor are they relevant to or reasonably
25 necessary for the implementation of Subdivision (b)’s registration scheme, and are therefore void
26 and unenforceable.

27 ///

28 ///

1 **C. Illegal Expansion of New “Assault Weapon” Definition to Include Shotguns**

2 11 C.C.R. § 5470, subd. (a) states that a “semiautomatic shotgun with an ammunition
3 feeding device that can be readily removed from the firearm with the use of a tool . . . is included
4 in the category of firearms that must be registered,” and 11 C.C.R. § 5471, subd. (a) defines the
5 term “[a]bility to accept a detachable magazine” as “with respect to a semiautomatic shotgun, it
6 does not have a fixed magazine.” The effect of these regulations is to require certain shotguns to
7 be registered as “assault weapons” that do not need to be under the AWCA. What’s more, only by
8 Defendant’s regulations, not California law, are such firearms now considered “assault weapons”
9 prohibited from being sold, transferred, and possessed in the state of California.

10 Since 2001, certain semiautomatic centerfire rifles and semiautomatic pistols that have
11 “the capacity to accept a detachable magazine” and any one of several specified features are
12 considered “assault weapons” under California law. (Pen. Code, §§ 30515, subd. (a)(1), 30515,
13 subd. (a)(4).) Likewise, any semiautomatic shotgun with “the ability to accept a detachable
14 magazine” is also considered an “assault weapon.” (Pen. Code, § 30515, subd. (a)(7).) SB 880
15 and AB 1135 only changed these definitions with respect to rifles and pistols, but not shotguns.
16 As stated in the legislative history of SB 880, the bill revised the definition of an “assault
17 weapon” to mean “a semiautomatic centerfire rifle, or semiautomatic pistol that does not have a
18 fixed magazine” but has any one of several specified features.¹⁰

19 In other words, DOJ seeks to classify shotguns equipped with “bullet-buttons” as “assault
20 weapons” not by legislative change, but by DOJ’s whim alone. Because the expansion of the
21 definition of an “assault weapon” to apply to certain shotguns is in direct conflict with the
22 provisions of AB 1135 and SB 880, and because the regulations expand the scope of the Penal
23 Code as it relates to “assault weapon” registration and DOJ’s APA exception, the regulations are
24 void and unenforceable.

25
26
27 ¹⁰ See Assem. Com. on Public Safety, Analysis of Sen. Bill No. 880 (2015-2016 Reg. Sess.) (June
28 25, 2016); See also Assem. Com. on Public Safety, Analysis of Sen. Bill No. 880 (2015-2016
Reg. Sess.) (June 13, 2016).

D. Serialization Requirements

11 CCR section 5472, subdivision (f) prohibits individuals from registering firearms manufactured by federally-licensed manufacturers if the firearm does not have a serial number engraved on the firearm. And 11 CCR section 5472, subdivision (g) prohibits individuals from registering lawful homebuilt firearms that lack a DOJ-approved serial number. Such restrictions unlawfully expand the scope of California law and are thus void for several reasons.

First, there is a patent difference between regulations implementing the registration procedures of Subdivision (b) and regulations requiring individuals to generate the content to be submitted as part of the registration application. Subdivision (b) does not require one to *create* or inscribe identification marks onto a firearm, but only requires that individuals *provide* “a description of the firearm that identifies it uniquely, including all identification marks,” i.e., ones that already exist. Nor does Subdivision (b) require the firearm to have a serial number at all, let alone one specifically “pre-approved” by DOJ.

Second, Californians have long been allowed to—and still can—legally make their own firearms without inscribing a DOJ-approved serial number on the firearm.¹¹ What restrictions California does have were only recently enacted, and won’t take effect until January 1, 2019—a full six months *after* the period to register a firearm as an “assault weapon” has ended. (See Pen. Code, § 29180, subd. (c).) These new restrictions will also require additional regulations that are not afforded an APA exemption. (See, e.g., Pen. Code, § 29182, subd. (f).)

Yet DOJ directly usurps legislative authority by advancing the effective date of Penal Code section 29180, subdivision (c). What’s more, DOJ is in effect claiming that Subdivision (b) somehow grants DOJ an exception from the APA rulemaking requirements to do so when it does not have that authority to make regulations via an APA exception.

As a result, because the regulations requiring individuals to inscribe DOJ-approved serial numbers onto homemade firearms expand the scope of the Penal Code as it relates to the

¹¹ Serial numbers on all firearms produced by licensed manufacturers were not required until enactment of the Gun Control Act of 1968. (P.L. 90-618, 82 Stat. 1213, 1223.) Federal law has never required serial numbers on firearms made by persons other than licensed manufacturers and importers engaged in the business of firearms.

1 registration of “assault weapons,” DOJ’s APA exception, and otherwise directly conflicts with
2 other provisions of California firearm laws, the regulations are void and unenforceable.

3 **E. Required Registration Information**

4 DOJ’s regulations also require individuals to provide their military ID number, U.S.
5 citizenship status, place of birth, country of citizenship, and alien registration number for use in
6 conducting a background check, as well as clear digital photographs of the firearms to be
7 registered. (11 C.C.R. §§ 5474, 5478, subd. (a)(2).) These requirements, however, are not found
8 anywhere in the Penal Code, let alone Subdivision (b), and serve as another example of DOJ
9 requiring individuals to generate additional content not called for in the application. As such, they
10 improperly expand the scope of Subdivision (b).

11 With regards to the requirement that individuals provide clear digital photographs of their
12 firearms, Subdivision (b) states that the registration must contain a “description” of the firearm—
13 not an *actual depiction*. Identical language can be found elsewhere in California law regarding
14 firearm registration. For example, Penal Code section 27560 requires anyone moving into
15 California with a firearm to report their ownership to DOJ on a form that contains “a description
16 of the firearm in question.” (Pen. Code, § 27560, subd. (a)(1).) Notably, this form—which has
17 been used by DOJ for years—has never required individuals to provide photographs of the
18 firearm to be registered.

19 The same is true of past “assault weapon” registrations. Penal Code section 30900,
20 subdivision (a) had the identical requirement as Subdivision (b). Yet, DOJ did not require
21 individuals to provide photographs of those registered “assault weapons.” (Pen. Code, § 30900,
22 subd. (a); See also 11 C.C.R., § 978.30 (repealed) (requiring individuals to only provide the
23 firearm’s serial number, make, model, type, caliber, and date of acquisition [if known]).)

24 **F. Joint-Registration Restrictions**

25 Penal Code section 30955 requires DOJ to accept joint registrations for any “assault
26 weapon” owned by “family members residing in the same household.” Defendants limit the scope
27 of this provision by narrowly defining the term “family members residing in the same household,”
28 thereby again defining a term as opposed to implementing the registration procedures of

1 Subdivision (b). (11 C.C.R. § 5474.1, subd. (b).) They also require joint registrants to provide
2 “proof of address.” (11 C.C.R. § 5474.1, subd. (c).) These regulations unlawfully expand the
3 scope of the AWCA’s requirements for “assault weapon” registration and do not qualify for
4 DOJ’s APA exception.

5 First, DOJ’s APA exception is limited to the implementation of Subdivision (b). But the
6 term “family member” is not found in Subdivision (b), meaning DOJ is once again attempting to
7 define a term found in an entirely different Penal Code section and attempting to shoehorn the
8 definition into DOJ’s APA exception. What’s more, the regulation does not merely address the
9 procedures for registering a newly classified “assault weapon,” but instead addresses the content
10 of the registration itself by limiting who may register a firearm.

11 Tellingly, DOJ has been subjected to the joint registration requirement since 1989, and yet
12 in every past instance requiring individuals to register “assault weapons” DOJ has never limited
13 its scope. If Defendants wish to limit the term, they may be able to do so through typical APA
14 rulemaking procedures. In fact, DOJ attempted to do just that in 2000, but after receiving public
15 comments, admitted that had the Legislature intended to limit the scope of the term, it “should
16 have been statutorily stated in a much clearer manner.”¹² But it cannot do so without following
17 the typical APA rulemaking procedures.

18 With regard to the “proof of address” requirement for joint registrants, the regulation does
19 not address the procedures for registering a newly classified “assault weapon,” rather the content
20 to be submitted. Subdivision (b)(3) provides the specific content that must be included with
21 registration. What’s more, individual and primary registrants are not required to provide the same
22 documentation. So requiring it from joint registrants is not only unnecessary, but unreasonable.

23 **G. Illegally Compelled Non-Liability Clause**

24 11 C.C.R. § 5473, subdivision (b)(1) requires registrants to agree to hold DOJ harmless
25 for “any hardware, software, information, or other items” associated with the registration process
26 as a condition of registering their firearms. This provision is patently unrelated to implementing

27 ¹² *Department of Justice Regulations for Assault Weapons and Large Capacity Magazines: Final*
28 *Statement of Reasons*, <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/fsor.pdf>.

1 registration procedures in Subdivision (b).

2 But even if DOJ sought to adopt such a requirement in compliance with the APA, it could
3 not. Such a provision directly conflicts with Article 1 of the California Constitution and the
4 Information Practices Act (“IPA”). Both specifically protect an individual’s right to privacy, limit
5 DOJ’s ability to disclose personal information, and provide statutory remedies for violations. (See
6 Cal. Const., art. I, § 1; Civ. Code, §§ 1798 et seq.) Defendants simply cannot unilaterally grant
7 themselves an exception to statutory restrictions.

8 In sum, the regulations either do not qualify for APA exemptions or they illegally expand
9 or contract the relevant statutes. On the basis of both the record and the argument above, there is
10 little doubt that Plaintiffs will succeed on the merits. Accordingly, these regulations are void and
11 unenforceable and Plaintiffs’ motion for preliminary injunction should be granted.

12 **III. THE BALANCE OF HARMS TIPS SHARPLY IN PLAINTIFFS’ FAVOR**

13 The Court must next balance the harm that Plaintiffs are likely to suffer if injunctive relief
14 does not issue against the harm Defendants are likely to suffer if it does. (*Cohen, supra*, 40 Cal.3d
15 at p. 286.) “To qualify for . . . injunctive relief plaintiffs must show irreparable injury, either
16 existing or threatened.” (*City of Torrance v. Transitional Living Ctrs. for L.A., Inc.* (1982) 30 Cal.
17 3d 516, 526, citing *7978 Corp. v. Pitchess* (1974) 41 Cal.App.3d 42, 46; see also Code Civ. Proc.,
18 § 526, subd. (a)(2).) Evaluating the irreparable harm factor requires courts to consider such things
19 as “the inadequacy of other remedies, the degree of irreparable harm, and the necessity of
20 preserving the status quo.” (*Take Me Home Rescue v. Luri* (2012) 208 Cal.App.4th 1342, 1350.)
21 Irreparable harm is usually present where plaintiff will suffer an injury for which adequate
22 compensation is difficult, if not impossible, to ascertain. (*Pellissier v. Whittier Water Co.* (1922)
23 59 Cal.App. 1, 6; *Wind v. Herbert* (1960) 186 Cal.App.2d 276, 285; see also Code Civ. Proc., §
24 526, subd. (a)(5).)

25 **If an Injunction Prohibiting Defendants from Enforcing the Challenged Regulations** 26 **Does Not Issue, Plaintiffs and the Public Will Suffer Irreparable Harm, But No** 27 **Harm Will Come to Defendants if it Does Issue**

28 By submitting their regulations as “file and print only,” Defendants have prohibited

1 Plaintiffs and others similarly situated from having any input. But, the purpose of the APA's
2 comprehensive scheme is to ensure that "those persons or entities whom a regulation will affect
3 have a voice in its creation." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 556
4 at pp. 568-569, citing *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204-205.) The
5 notice, comment and review procedures of the Act were enacted to secure the public benefits of
6 openness, accessibility, and accountability in the formulation of rules that implement legislative
7 enactments. (*Id.* at p. 569 ["public participation in the regulatory process directs the attention of
8 agency policymakers to the public they serve"].) The moment Defendants adopted and began
9 enforcing the challenged regulations in violation of the APA, they brought irreparable injury to
10 the important, democratic values the Act was designed to serve. If injunctive relief does not issue,
11 Defendants will be permitted to continue subverting those very values at the expense of the public
12 generally and Plaintiffs specifically.

13 Plaintiffs particularly will be irreparably harmed because Defendants' unlawful conduct
14 has denied them their *statutory right to be heard* under the APA regarding the implementation of
15 DOJ's regulations that directly affect them. Perhaps more importantly, however, is that the APA
16 is designed to protect against "bureaucratic tyranny." (*Cal. Advocates for Nursing Home Reform*
17 *v. Bonta* (2003) 106 Cal.App.4th 498, 507-508.) DOJ is now forcing Plaintiffs to either comply
18 with an invalid regulatory scheme or face significant penalties for unlawfully possessing an
19 "assault weapon" should they not register. For such an injury, there is no adequate remedy at law
20 to make them whole.

21 DOJ has processed the registration of newly classified "assault weapons" on multiple
22 occasions in the past. And on those prior occasions, the regulations challenged here were
23 unnecessary. There is no reason this registration system should be any different. In any event, any
24 turmoil Defendants experience in the meantime is the product of Defendants' own unlawful
25 conduct, which Plaintiffs clearly warned Defendants about on multiple occasions in their
26 opposition letters to DOJ and OAL. Given that Defendants had well over 5 months to revise their
27 proposal when it was first challenged, and that their most recent proposal remains substantially
28 the same, they should not be permitted to flout the requirements of the APA and then rely on any

1 administrative problems cause by their clear malfeasance, which has developed into a pattern, as a
2 shield against those seeking injunctive relief from invalid regulations.

3 In sum, public policy compels that DOJ be enjoined to maintain the integrity of the
4 regulatory system under the APA; otherwise, BOF, and all agencies for that matter, would feel
5 emboldened to ignore they APA's mandates when they believe they can run out the clock. For
6 these reasons, the balance of harms clearly tips in Plaintiff's favor. But, even if the Court does not
7 find the harm to Plaintiffs particularly irreparable, it may, and should nevertheless grant their
8 motion, due to the extremely strong likelihood that they will prevail on the merits. (*King v. Meese*
9 (1987) 43 Cal.3d 1217, 1227 ["the more likely it is that plaintiffs will ultimately prevail, the less
10 severe must be the harm that they allege will occur if the injunction does not issue."].)

11 CONCLUSION

12 Based on the foregoing, Plaintiffs respectfully request that this Court grant their motion
13 for a preliminary injunction mandating Defendants, their employees, agents, and persons acting
14 with them on their behalf, immediately cease enforcing the regulations indicated herein pending
15 litigation on the merits of this matter.

16
17 Dated: January 8, 2018

MICHEL & ASSOCIATES, P.C.

18
19 /s/Sean A. Brady
20 Sean A. Brady
21 Attorneys for Plaintiffs
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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA
3 COUNTY OF FRESNO

4 I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County,
5 California. I am over the age eighteen (18) years and am not a party to the within action. My
business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

6 On January 8, 2018, I served the foregoing document(s) described as:

7 **NOTICE OF ERRATA REGARDING MEMORANDUM OF POINTS**
8 **AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR**
9 **PRELIMINARY INJUNCTION**

10 on the interested parties in this action by placing

11 [] the original

[X] a true and correct copy

12 thereof by the following means, addressed as follows:

13 P. Patty Li
14 Deputy Attorney General
15 California Department of Justice
16 Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Attorneys for Defendants

17 _____ (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by
18 electronic transmission through OneLegal. Said transmission was reported and completed without
error.

19 X (STATE) I declare under penalty of perjury under the laws of the State of
20 California that the foregoing is true and correct.

21 
22 LAURA PALMERIN
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28