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December 15, 2020

VIA TRUEFILING
Brian A. Cotta
Clerk/Executive Officer
Court of Appeal, Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721-3004

Re: *Villanueva, et al. v. Becerra, et al.*, Case No. F078062

Dear Mr. Cota:

Appellants Danny Villanueva, Niall Stallard, Ruben Barrios, Charlie Cox, Mark Stroh, Anthony Mendoza, and California Rifle & Pistol Association, Incorporated, respond to the Court's letter requesting supplemental briefing concerning whether the 2020 legislative amendment to Penal Code section 30515, subdivision (a)(7) ("Amendment"), has mooted Appellants' challenge to DOJ's regulations that treat "bullet-button shotguns" as "assault weapons" (i.e., Cal. Code Regs., tit. 11, §§ 5470, subd. (d), 5471, subds. (a), (pp)). In its letter, the Court correctly described the Amendment's effect (i.e., that it includes within the "assault weapon" definition "[a] semiautomatic shotgun that does not have a fixed magazine"). The Court also correctly described Appellants' argument for why DOJ's regulations are unlawful (i.e., that the pre-amended version of section 30515, subdivision (a)(7) did not include "bullet-button shotguns" within its definition of "assault weapon" and thus DOJ had no authority to treat such shotguns as "assault weapons" before the Amendment). Appellants' challenge to DOJ's regulations is not moot because a ruling in their favor could still provide safe harbor from criminal prosecution. But, even if it is moot, this Court should still determine the issue because DOJ has a historical pattern and practice of flouting laws that constrain it and either changing its regulation or running to the legislature just in time to avoid serious judicial review. It is now time for DOJ to be held to account.

"An appeal should be dismissed as moot" only when "the occurrence of events renders it *impossible* for the appellate court to grant appellant *any effective relief*." (*Cucamonga United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479, italics added.) Just because "bullet-button shotguns" now fall within a *statutory* "assault weapon" definition, there remains effective relief this Court could grant by declaring that DOJ lacked authority to previously treat those shotguns as "assault weapons" through *regulations*. Such a declaration would provide safe harbor from criminal prosecution or civil penalty for anyone who possessed a "bullet-button shotgun" before August 6, 2020, the date the Amendment took effect. (Sen. Bill No. 118 ("SB 118") (2019-2020 Reg. Sess.) (eff. Aug. 6, 2020).)

This is because under California Code of Regulations, title 11, section 5460 (applying all of its regulatory definitions to the identification of "assault weapons" under Penal Code section 30515), DOJ's regulations defining "bullet-button shotguns" as "assault weapons" subject people

in possession of these shotguns who did not register them (because doing so was not required) to criminal prosecution. (Pen. Code, § 30605, subd. (a).) Because the statute of limitations on such a criminal action remains open, the State could still bring criminal actions for possession of these shotguns before August 6, 2020, when the Amendment took effect. (See Pen. Code, § 802, subd. (a).)

In fact, in its supplemental letter to this Court, DOJ makes clear that it intends to apply the new "bullet-button shotgun" definition retroactively. (pp. 2-3.) This shows that Appellants' concerns about criminal prosecution for pre-Amendment possession are not theoretical. Without a declaration from this Court confirming that DOJ lacked authority to adopt regulations that treat "bullet-button shotguns" as "assault weapons" before the Amendment, there remains DOJ's express threat of retroactive prosecution.

To be sure, DOJ is wrong that the Amendment applies retroactively. "[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*McClung v. Emp. Dev. Dept.* (2004) 34 Cal.4th 467, 475.) DOJ cites nothing on the face of SB 118 nor in its legislative history that even suggests, let alone expressly states, that it is to apply retroactively. And it could not, for there is nothing. That dooms DOJ's argument.

Regardless, DOJ tries to avoid that fate by arguing that SB 118 did not change Penal Code section 30515, subdivision (a)(7), it merely "clarified" the correct interpretation of it. As such, DOJ argues, it need only show that retroactive application does not " 'substantially change[] the legal consequences' of the earlier conduct." (p. 2, citing *In re J.C.* (2016) 246 Cal.App.4th 1462, 1478, quoting *W. Sec. Bank v. Super. Ct.* (1997) 15 Cal.4th 232, 243.) DOJ circularly relies on the very unlawful regulations that are the subject of this appeal to claim that the Amendment does not change the legal consequences for those who possessed a "bullet-button shotgun" before its passage. (*Id.* at pp. 2-3.) But Appellants' entire point is that those regulations are void and should have never been enforced. DOJ cannot claim its enforcement of unlawful regulations protects those regulations from legal challenge. Yet that is precisely what it asks this Court to do.

DOJ also argues that the Amendment was a "clarification" because the legislature "promptly" amended the law when it learned of the interpretation issue. (p. 2, *citing W. Sec., supra*, 15 Cal.4th at p. 243.) But Appellants notified DOJ of the bases for their claim in 2016 and ultimately filed a lawsuit when DOJ ignored them in 2017. (Compl. at pp. 17-21.) According to DOJ, amending a law *after more than three years* is "prompt." That is an unserious argument, and itis not supported by any of the case law DOJ relies on.

Finally, DOJ argues that the Amendment was a "clarification" because the original law was "ambiguously worded" and both parties "made credible arguments" for their respective interpretations. (p. 3, citing *Carter v. Cal. Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 926.) As an initial matter, DOJ has made no credible argument for its interpretation allowing it to treat "bullet-button shotguns" as "assault weapons." Even if it had, DOJ fails to explain how this doctrine applies to criminal statutes like the one here, given the Rule of Lenity. (See *United States v. Santos* (2008) 553 U.S. 507, 514.)

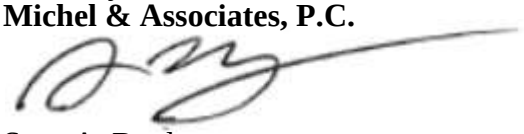
Ultimately, the determination of whether the Amendment applies retroactively belongs to the courts, not the legislature. (*W. Sec. Bank, supra,* 15 Cal.4th at p. 244.) Even assuming DOJ could show that the legislature intended the Amendment to apply retroactively, this Court can and should reject that interpretation as unconstitutional. First, "[t]he Ex Post Facto Clause flatly prohibits retroactive application of penal legislation" and the Due Process Clause "protects the interests in fair notice . . . that may be compromised by retroactive legislation." (*Landgraf v. Usi*

Film Prods. (1994) 511 U.S. 244, 266.) The Amendment changed a criminal law. And, if applied retroactively, those impacted would not have had fair notice.

Whether DOJ's regulations that treat "bullet-button shotguns" as "assault weapons" (i.e., Cal. Code Regs., tit. 11, §§5470, subd. (d); 5471, subds. (a), (pp)) is, therefore, not moot. Even if it were, however, appellate review would still be appropriate.

As Appellants have explained, this Court may and should review this matter, even if it would otherwise be moot. (Reply Br. at pp. 16-19.) Appellants' reasons generally stem from DOJ's historical pattern of flouting regulatory constraints and the concern that this pattern of malfeasance will continue. (*Ibid*.) Appellants have already provided as an example the case of *Belemjian v. Harris*, where DOJ ignored protests that its regulations were illegal because they had not gone through the APA process but later adopted the *very same rules* as "emergency regulations" under the APA only after litigation had been filed—even though the "emergency" was of its own making. (*Id.* at p. 17.) Since then, DOJ persuaded the legislature to adopt a bill to change the nature of a fee while the appeal of a years-long lawsuit about the propriety of DOJ's implementation of that fee was pending. (See *Gentry v. Harris*, Ct. App.l, Third Dist., Case No. C089655.) And, as Appellants predicted, here DOJ goes again, making a last-minute maneuver to attempt to avoid serious judicial review of its malfeasance here by convincing the legislature to adopt the Amendment.[1] The time has come for DOJ to answer, on the record, for its pattern of abusive regulatory practices spanning several years.

Sincerely,
Michel & Associates, P.C.



Sean A. Brady
Attorneys for Plaintiffs-Appellants

[1] In fact, the bill not only changed the law to address the "bullet-button shotgun" issue, it also amended Penal Code section 30515 to add firearms that are not rifles, pistols, or shotguns with certain characteristics to the ever-growing list of "assault weapons" after refusing for months to fix known limitations with DOJ's Dealers Record of Sale Entry System (DES) that stymied the lawful transfer of such firearms before they were labelled "assault weapons" by the legislature.

PROOF OF SERVICE

Case Name: *Villanueva, et al. v. Becerra, et al.*
Court of Appeal Case No.: F078062
Superior Court Case No.: 17CECG03093

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, 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, Long Beach, California 90802.

On December 15, 2020, I served a copy of the foregoing document(s) described as: **Appellants' Supplemental Letter Brief**, on the following party, by electronic transmission through TrueFiling. Said transmission was reported and completed without error.

P. Patty Li
patty.li@doj.ca.gov
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Attorneys for Defendants and Respondents Xavier Becerra, et al.

On December 15, 2020, I served a copy of the foregoing document(s) described as: **Appellants' Supplemental Letter Brief**, on the following party, by mail as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Superior Court of California
County of Fresno
Appeal Department
1100 Van Ness Avenue,
Fresno, CA 93724-0002

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

Executed on December 15, 2020, at Long Beach, California.

Laura Palmerin