ACLU California

January 16, 2020

Attorney General Xavier Becerra
California Department of Justice
Attn: DOJ Regulations Coordinator
1300 I Street, Suite 820
Sacramento, CA 95814
DOJRegulationsCoordinator@doj.ca.gov

RE: Regulations for the Fair and Accurate Governance of the CalGang Database Title 11, Division 1, Chapter 7.5; Regulations for the Fair and Accurate Governance of Shared Gang Databases, Title 11, Division 1, Chapter 7.6

Dear Attorney General Becerra,

On behalf of the ACLU of California,[1] which supported the passage of AB 90, and which works with those affected by shared gang databases, we submit these written comments to the Office of Attorney General ("OAG") and California Department of Justice ("DOJ" or "the Department") on the changes made to the proposed regulations for the Fair and Accurate Gang Database Act of 2017, referred to hereinafter as AB 90. We intend these comments as an addendum to our June 25, 2019 letter ("June 25 Letter") and our August 15, 2019 letter ("August 15 Letter"), which are attached as Attachment A and Attachment B, respectively.

The DOJ's most recently proposed regulations reflect a dramatic turn from the improvements made in its draft published on July 31, 2019 ("July 31st Draft"). The draft regulations published on December 31, 2019 ("December 31st Draft") once again reflect a significant inconsistency with the text and the purpose of the authorizing legislation and fail to sufficiently protect the public against overinclusion in shared gang databases, which was the intent of AB 90.

Most significantly, the DOJ has doubled-down on its failure to rely on empirical evidence to develop the criteria and retention periods—as mandated by AB 90. Instead, the DOJ repeatedly states that it is including certain criteria at the behest of law enforcement absent overwhelming empirical evidence that the criteria are *not* probative of gang participation. In so doing, the resultant regulations largely codify the prior criteria that led to substantial racial disparities and overbreadth—even to the point of the inclusion of the son of African-American Assemblymember Shirley Weber[2]—that motivated the passage of AB 90 in the first instance. The DOJ once again ignores its

[1] The ACLU of California is comprised of the ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego & Imperial Counties.
[2] Letter from Shirley Weber, Assemblymember, to Xavier Beccerra, Attorney General (June 25, 2019) (attached as Attachment C).

own empirical study and the additional research submitted by the public showing that many of these criteria—such as association, gang addresses, and colors of clothing—are weak indicators of gang membership at best, and would continue the overinclusion of Black and Latino residents simply because they reside within areas that law enforcement has targeted for gang policing. The Department has provided *no empirical basis* for including these criteria and—to the extent any empirical evidence exists on these criteria explicitly—that research indicates that such criteria are ambiguous and likely to lead to falsely identifying people as gang members. While the DOJ initially removed four of the most ambiguous and overbroad criteria—namely reliance on a "reliable source," association with another alleged gang member, presence at a "gang-related address," and wearing gang-related colors or clothing—in its July 31st Draft in response to public comments[3], their reintroduction is justified solely based upon their usefulness to law enforcement, not any evidence that they are accurate or significantly probative of gang membership.

A recent scandal involving the Los Angeles Police Department ("LAPD") vividly illustrates how CalGang is, and may continue to be, misused to harm members of predominately Black and Latino communities—and why the regulations must adopt strong criteria and not undermine the statutory scheme for challenging inclusion. Last week, news reports uncovered that over a dozen LAPD officers falsely identified individuals as gang members and entered them into CalGang.[4] The number of officers involved in falsifying records has since increased to twenty.[5] These false identifications were in part based on the subjects' supposed admissions of gang membership. It was discovered that police lied about these admissions when, upon receipt of the statutory notice of inclusion, the mother of a young person designated a gang member challenged this designation with the agency. The agency reviewed the body camera footage of the officer's interaction with her son and discovered that he had not admitted gang membership—contrary to the officers' field interview card and the CalGang entry. The LAPD investigated other claims of gang admission by additional officers in the same unit and found a number of other instances in which body camera footage contradicted the officer's claim that an individual admitted gang membership.

This misconduct—committed even after a state audit already found LAPD among agencies in violation of CalGang's governing rules—underscores a number of the concerns repeatedly raised by the public and which motivated legislative intervention through AB 90 and AB 2298. First, and most dramatically, it continues to demonstrate that, notwithstanding the governing rules and potential penalties for their violation, some officers will improperly add individuals into CalGang. It is therefore crucial that the regulations require police to document the source material that purportedly supports the gang designation—including by mandating that bodycam footage be uploaded to CalGang whenever available—and that full disclosure of the source documents purportedly

[3] While DOJ acknowledged that it removed these criteria in response to public comments, it provided no substantive discussion of its basis for that decision.

[4] Heather Murphy, *Los Angeles Officers Suspended After Boy Is Wrongly Labeled a Gang Member*, N.Y. TIMES (Jan. 8, 2020), https://www.nytimes.com/2020/01/08/us/lapd-gang-database.html.

[5] Mark Puente and Richard Winton, *LAPD Scandal Over Alleged Gang Framing Swells to 20 Officers; Chief Sees A 'Criminal Aspect,'* L.A. Times (Jan. 14, 2020), https://www.latimes.com/california/story/2020-01-14/lapd-scandal-lapd-gangs.

establishing the basis for an individual's inclusion in CalGang be produced to allow for a meaningful challenge.

Second, it illustrates how police disproportionately target Blacks and Latinos and their communities for gang labeling. The unit implicated in this falsification of gang admission was the Metropolitan Division—which has a significant presence in South Los Angeles and was already under criticism for its over-policing of Black and Latino residents.[6] To prevent the continued overinclusion of people of color, the DOJ must avoid overbroad criteria or retention policies and unfettered law enforcement discretion.

Finally, it highlights the problems inherent in the DOJ's continued reliance on law enforcement's own assertions that their perceptions of gang membership are accurate. While DOJ reintroduced numerous criteria "based on [law enforcement's] extensive knowledge of and history with gang members, [that those criteria] can be a strong indicator of gang membership," law enforcement rarely if ever is required to establish that those it designates as gang members truly are. In fact, their reliance on their own supposed expertise in determining gang membership led to the improper inclusion of individuals that the Legislature decided to address through AB 90 and AB 2298. With respect to those the LAPD falsely designated as gang members, until their admissions were uncovered as fabrications they would have been cited as evidence of correctly identified gang members in part based upon the "strong criteria" of self-admission—with the remaining criteria they supposedly satisfied also deemed indicative of gang membership as a result.[7] Thus, law enforcement's assertions of the accuracy of their own opinions should not be taken as fact and absolutely should not supersede existing empirical research to the contrary—as the DOJ has done.

Comments on Modification to Text of Proposed Regulations

I. The proposed criteria are not evidenced-based and are overbroad. (CalGang Regulations, § 752.4; Shared Databases Regulations § 771.8)

Entry into a gang database based on the following criteria as defined are ambiguous and overbroad and therefore not probative of gang membership: (a) arrested for an offense consistent with gang activity[8]; (b) identified as a gang member or associate by a reliable source[9]; (c) associating with

[6] Eric Leonard, Andrew Blankstein and Philip Drechsler, *LAPD Officers Suspected of Filing False Data on South LA Traffic Stops,* NBC (Jan. 6, 2020), https://www.nbclosangeles.com/news/local/lapd-officers-suspected-of-filing-false-data-on-south-la-traffic-stops/2286372/.

[7] In fact, they are likely included in the DOJ's most recent research, with the remaining criteria associated with their entries deemed more accurate because they had also purportedly self-admitted.

[8] Second Modified CalGang Regulations Section 752.4(a)(2), Second Modified Shared Gang Database Regulations Section 771.8(a)(2). All further statutory references are to the Second Modified CalGang and Shared Gang Databases Regulations unless otherwise noted. See also June 25 letter at 5-6.

[9] CalGang Regulations Section 752.4(a)(3); Shared Gang Database Regulations Section 771.8(a)(3). See also June 25 letter at 6-7.

individuals currently in the CalGang database[10]; (d) present at a gang-related addresses[11]; and (e) wearing a color or item of clothing law enforcement contends is tied to a specific gang.[12] In addition to our comments below, we incorporate by reference our objections to these criteria described in our prior letters.

In failing to change or eliminate these criteria from the proposed regulations, the Department disregards explicit instruction by the California Legislature that criteria for entry must be "consistent with empirical research on gangs and gang membership."[13] Under this section of the Penal Code, the Department may only adopt criteria if empirical research shows they are probative of gang membership. The Department's Second Addendum to the Initial Statement of Reasons states repeatedly that the Department relied on the opinion of police officers in reincluding certain criteria because the DOJ contends there is no definitive empirical research demonstrating that the criteria are *not* probative of gang involvement. [14] But there is certainly no definitive empirical evidence concluding that these criteria—reliable source identification, association, gang-related addresses, and gang-related colors or clothing—*are* reliable indicators of gang membership. Thus, pursuant to the express command of AB 90 these criteria must be excluded until such empirical research exists. Because there is no empirical research that supports the inclusion of these criteria, we recommend that they be excluded in their entirety from the regulations.

We recognize that the DOJ has attempted to narrow some of these criteria, but if they remain, these amendments do not go far enough to prevent law enforcement from indiscriminately adding individuals to the gang database. For instance, while they have narrowed "gang-related addresses or locations" to a "gang-related address"[15] exclusive of entire neighborhoods and schools, this is still ripe for misuse and over-inclusion. From our own experience litigating gang allegations, we have seen law enforcement claim that an individual's presence at addresses such as a local market or a major intersection was indicative of gang membership.[16] DOJ's amendments to this criterion do not prevent such designations from continuing to occur. Similarly, reliance on gang colors and clothing remains inherently overinclusive when any color, including colors like black and beige, is asserted to be gang-related if law enforcement also perceives its wearer to be a gang member, yet innocuous if the wearer is not pre-determined to be a gang member.[17]

The continued reliance on reliable source also remains inconsistent with existing law. Even though the current proposed regulations limit the invocation of this criterion, its use will prohibit individuals from meaningfully utilizing the scheme set forth by the legislature to challenge database inclusion

[10] CalGang Regulations Section 752.4(a)(4); Shared Gang Database Regulations Section 771.8(a)(4). See also June 25 letter at 8-10; August 15 letter at 3.
[11] CalGang Regulations Section 752.4(a)(6); Shared Gang Database Regulations Section 771.8(a)(6). See also June 25 letter at 10-13; August 15 letter at 3.
[12] CalGang Regulations Section 752.4(a)(7); Shared Gang Database Regulations Section 771.8(a)(7). See also June 25 letter at 13-15; August 15 letter at 3.
[13] Penal Code § 186.36(l)(2).
[14] CalGang Second Addendum to Initial Statement of Reasons ("CalGang Second Addendum") at 20-24; Shared Gang Databases Second Addendum to Initial Statement of Reasons ("Shared Gang Databases Second Addendum") at 15-19.
[15] Additionally, we continue to object to this criterion on the basis that it has been statutorily excluded under Penal Code Sections 186.36(r)-(s).
[16] See also June 25 letter at 11.
[17] See also June 25 letter at 14.

because that scheme does not include any evidentiary hearing or ability to subpoena witnesses. While law enforcement must document the source's alleged basis for its opinion that an individual is a gang member, an accused will have much less ability to challenge those allegations because they will not have access to the type of documentation—photographic records, body camera evidence, etc.—required when law enforcement makes similar observations and are not provided opportunity to confront the source. As the LAPD incident illustrates, access to the actual evidence from the contact in which the criteria were purportedly observed is absolutely crucial to ensuring that individuals can effectively contest being wrongfully added to gang databases.

The association criterion[18] also remains overbroad, despite DOJ's attempt at limitation. As currently written, the regulations permit this criterion to be satisfied if the association is with someone already in CalGang and there is reasonable suspicion that the person "contribute[s] to, or [is] participating in, the criminal street gang's illegal activities."[19] First, by allowing this criterion to be satisfied through association with anyone in CalGang—including gang "associates," not only those alleged to be gang "members"—this could greatly extend the reach of the database. Second, we have seen that actions such as a family member "allowing" their purportedly gang-affiliated relative to associate with other alleged gang members in their shared home is a type of conduct law enforcement view as contributing to gang activity. Family members and other innocent associates therefore remain at risk—particularly given that law enforcement is allowed to include "non-member associates" in the database, whom they do not even have to purport are active members of any gang. While we continue to believe that this criterion should be eliminated completely, at minimum it must be further narrowed to limit it to associations in the commission of gang-related crime—which is the association that is the most reliable predictor of gang membership, rather than merely any association law enforcement contends occurs under "circumstances . . . [that] indicate[] gang affiliation."[20] If association is to remain, it also should be deemed a weak criteria, potentially requiring the satisfaction of three criteria for inclusion under Section 752.2(c)(1) in addition to gang-related addresses and clothing.[21]

Finally, the most recent proposed regulations also allow law enforcement to rely on old tattoos, marks, scars, or brandings to establish current active gang membership, which should be prohibited. While the proposal only allows each individual marking to count once toward satisfying this criterion, it expressly allows law enforcement to re-use these markings once "the record of that person has since been purged from the CalGang database."[22] This means that once an individual has either won removal by proving to a court that they are not an active gang member or their record has aged out of the system after five (or three) years, law enforcement can once again rely upon markings that were either deemed non-dispositive of gang membership or are at least three to five years old to establish current membership. This is directly contrary to the statutory mandate which

[18] CalGang Regulations Section 752.4(a)(4); Shared Gang Database Regulations Section 771.8(a)(4).
[19] CalGang Regulations Section 752.4(a)(4)(A); Shared Gang Database Regulations Section 771.8(a)(4)(A).
[20] See also June 25 letter at 14.
[21] While CalGang Regulations Section 752.2 reads, ". . .a person may be only entered into the CalGang database and designated as a Gang Member or Associate . . .," the parallel section of the Shared Gang Databases regulations, Section 771.6 reads, ". . . a person may be entered into a shared gang database and designated as a Gang Member or Associate . . ." Recognizing this may be a typo, we recommend that the word "only" be added to the Shared Gang Database regulation, so the sections will be identical.
[22] CalGang Regulations Section 752.4(a)(8); Shared Gang Database Regulations Section 771.8(a)(8).

only allows inclusion based upon currently active gang status.[23] While purging an individual's record may, in some cases, render law enforcement unaware that a currently observed marking is old, the regulations should not explicitly permit reliance on such old markings to satisfy a criterion of active gang membership. Instead, the regulations should prohibit reliance on markings that are more than a year old. To allow otherwise is also inconsistent with the current regulation that the "required number of criteria shall *occur* within a one-year period" (emphasis added)—as a marking that was created over a year prior would necessarily not occur within a one-year period of any other currently observed criteria.

II. Despite changes to provisions on the retention period, the retention periods chosen by the DOJ are not evidenced-based (CalGang Regulations, § 754.4-754.6; Shared Databases Regulations § 773.8-774)

In our previous letters, we advised the DOJ that empirical research does not support a five-year retention period for adults or a three-year retention period for juveniles[24]; however, the DOJ's proposed regulations continue to ignore studies, including the DOJ's own research assessment, evidencing shorter terms of gang membership for both adults and juveniles. Like the criteria for inclusion, Penal Code § 186.35(l)(3) requires the DOJ to set a retention period "that is consistent with empirical research on the duration of gang membership." In addition to ignoring numerous studies supporting shorter retention periods, the DOJ cites no studies supporting a five-year retention period for adults or a three-year retention period for juveniles. Thus, the DOJ directly violates the Legislature's instruction in the Penal Code by setting retention periods unsupported by evidence.

Empirical research also does not support setting a five-year retention period for a person whose name was entered as a juvenile who reaches adulthood before their information is purged from the database. The Second Addendum to the Initial Statement of Reasons clarifies that "a juvenile who becomes an adult and who satisfies the designation requirements again pursuant to section 752.2 will have a five year retention period for their record pursuant to section 754.4."[25] As of March 11, 2019, police had entered the names of only 63 juveniles who were 14 years of age or younger into CalGang.[26] Under the DOJ's rule, 94 percent of the juveniles entered into CalGang would be subject to the five-year retention period. The three-year retention period is almost inapplicable in practice. As described above, evidence-based research does not support such a long retention period for youth or adults. In addition to shortening the retention period for youth, if the database must include youth at all,[27] the DOJ should amend this regulation to apply the shorter retention period to those under 18 at the time they were entered into CalGang or a shared gang database.

[23] Penal Code Section 186.35(d)

[24] See June 25 letter at 15; August 15 letter at 4.

[25] CalGang Second Addendum at 40; Shared Gang Database Second Addendum at 33.

[26] See Attachment D, Cal. Dept. of Justice, Number of Minors Per Age in CalGang, (Mar. 11, 2019), which was referenced in the DOJ's Initial Statement of Reasons at 18 and obtained from the DOJ via an email to the ACLU.

[27] Minors only comprise 1.2 percent of the total entries in CalGang. See Chart 3, Cal. Dept. of Justice, Attorney General's Annual Report on CalGang for 2018 at 4. Because the deletion of all juvenile records would so negligibly affect CalGang, it is unnecessary for juveniles to be in CalGang or shared gang databases at all.

The Department should set a three-criteria requirement to reset the retention period when the gang-location and gang-clothing criteria are used together.[28] We commend the DOJ for applying a two-criteria requirement for the retention period to reset, as we had advised in our previous letters.[29] In the newest set of proposed regulations, the DOJ proposed a three-criteria requirement for entry into the database when the gang-location and gang-clothing criteria are used together.[30] This change is consistent with that provision.

III. The regulations should prohibit the use of social media posts as source documents because social media posts are inherently unreliable.

Although the December 31st Draft cautions police against relying on social media as evidence supporting the criteria for inclusion it does not prohibit doing so. The Second Addendum to the Initial Statement of Reasons recognizes the unreliability of social media because accounts may be compromised and users may publish untrue information intentionally.[31] Because police have no way of verifying the age of the photograph or video, the user responsible for the posting, or the accuracy of the content, the regulations should ban the use of social media posts as source documents.

If the police may rely upon social media posts as source documents, the DOJ should address two issues: (1) the regulations do not require police to document any indicia of reliability that may be challenged; and (2) the regulations allow for friending, follows, retweets, reposts, etc. to indicate association, even though such trivial actions do not indicate a real relationship.

IV. The DOJ should impose more rigorous safeguards in the provisions on access and proxy sharing to prevent adverse immigration consequences

As we stated in both of our previous letters,[32] allowing the DOJ to grant access to out-of-state agencies not only exceeds the authority granted to the DOJ under the statute but undermines the protections the Legislature thought necessary to limit the transmission of "fact-based or uncorroborated information" that results in a designation of gang membership.[33] We reassert our previously stated recommendations for addressing problems with access and proxy sharing.

V. The proposed regulations undercut the clear statutory evidentiary scheme for adjudicating removal petitions

The December 31st Draft continues to include provisions allowing a law enforcement agency to present to a court, *in camera*, evidence relating to an individual's inclusion in a gang database that has not been disclosed to the individual pursuant to the process of disclosure specified in Penal Code §§ 186.34(c)(1) and (d)(1)(B). As previously stated, such provisions appear to encourage non-

[28] In addition, we argue that the regulations should require three criteria to reset the retention period when association is used with either the gang-location or gang-clothing criteria, consistent with our argument in Section I of this letter.

[29] See June 25 letter at 15-16; See August 15 letter at 4.

[30] CalGang Regulations Section 752.2(c)(1), Shared Gang Databases Regulations Section 771.6(c)(1).

[31] CalGang Second Addendum at 27; Shared Gang Databases Second Addendum at 22.

[32] See June 25th letter at 16-17; August 15 letter at 6-7.

[33] Penal Code § 186.34(a)(2) (defining gang database).

disclosure of source documents to a person who may want to challenge their inclusion in a gang database and are inconsistent with the statutory scheme that limits both parties' Superior Court challenges to the evidentiary record created during the agency-level challenge.[34] Thus, we renew our objections.

Additionally, the December 31st Draft has now made it optional for agencies to provide the documentary evidence supporting its designation in its notices of inclusion and responses to requests for information.[35] This is again inconsistent with the statutory scheme requiring the production of evidence during the agency-level review. It is also inconsistent with the statutory language requiring agencies to provide "information as to the basis for the designation for the purpose of contesting the designation."[36] Instead, the regulations should explicitly require agencies to provide the documentation supporting the designation in notices of inclusion and responses to requests for information.

The DOJ justifies making this disclosure optional by stating that, "the Department did not make this provision mandatory in the event that the law enforcement agency has confidential documents which it does not want to disclose."[37] However, the regulations already explicitly include provisions allowing an agency to withhold source documentation if doing so "would compromise an active criminal investigation or the health or safety of a juvenile who is designated as a Gang Member or Associate."[38] Even this regulatory provision is unnecessary given that the authorizing statute already limits the agency's obligation to disclose under these same conditions.[39] Thus these new provisions making disclosure of information optional merely authorize agencies to withhold this information as a matter of course and without any justification.

In addition to being contrary to the statutory disclosure requirement, the DOJ recognizes in its Second Addendum to the Initial Statement of Reasons, "[i]t is beneficial to all parties for law enforcement to include the supporting documentation for the criteria that were satisfied for a person's designation because of limitations placed in subdivision (c) of Penal Code section 186.35."[40] We agree that this disclosure would be best practices in addition to being consistent with the statutory requirement, and recommend that this explicitly should be made mandatory.

VI. The Gang Database Technical Advisory Committee should be asked to continue its oversight mission by allowing members to participate in California Gang Node Advisory Committee meetings

We reiterate our recommendation from our August 15 letter that the Gang Database Technical Advisory Committee continue its oversight role by participating in California Gang Node Advisory Committee meetings.[41]

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[34] See June 25 letter at 19-20; August 15 letter at 6-7.
[35] CalGang Regulations Sections 753.6(d)(1), 754(c)(1); Shared Gang Databases Regulations Sections 773(d), 773.4(c).
[36] Penal Code § 186.34(c)(1), (d).
[37] CalGang Second Addendum at 35; Shared Gang Databases Second Addendum at 29.
[38] CalGang Regulations Sections 753.6(i), 754(d); Shared Gang Databases Regulations Sections 773(i), 773.4(d).
[39] Penal Code § 186.34(d)(2).
[40] CalGang Second Addendum at 35; Shared Gang Databases Second Addendum at 29.
[41] See August 15 letter at 7.

* * *

We sincerely hope OAG and DOJ consider the objections and recommendations contained within this letter as well as our two previous comments and revise the proposed regulations to reflect the underlying intent of this legislation to safeguard the privacy of the public and ensure that individuals are not unnecessarily added to and surveilled in gang databases.

Sincerely,

ACLU of California

CC: Shayna Rivera, CalGang Unit Manager
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820

Thomas Bierfreund, Associate Governmental Program Analyst
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820

gangdatabaseGDTAC@doj.ca.gov

Attachment A

ACLU California

June 25, 2019

Attorney General Xavier Becerra
California Department of Justice
Attn: DOJ Regulations Coordinator
1300 I Street, Suite 820
Sacramento, CA 95814
DOJRegulationsCoordinator@doj.ca.gov

RE: Regulations for the Fair and Accurate Governance of the CalGang Database Title 11, Division 1, Chapter 7.5; Regulations for the Fair and Accurate Governance of Shared Gang Databases, Title 11, Division 1, Chapter 7.6

Dear Attorney General Becerra,

On behalf of the ACLU of California[1], which supported the passage of A.B. 90, and who works with those affected by shared gang databases, we submit these written comments to the Office of Attorney General (OAG) and California Department of Justice (DOJ) on the proposed regulations for the Fair and Accurate Gang Database Act of 2017, referred to hereinafter as A.B. 90.

Background

The Legislature enacted A.B. 90 in order to establish rigorous guidelines and impose greater oversight over databases that law enforcement agencies use to share information about suspected gang members, to address some of the documented harms to public privacy and safety such databases have been documented to cause. As former Attorney General Bill Lockyer recognized back in 1999, shared gang databases "mix verified criminal history and gang affiliations with unverified intelligence and hearsay evidence, including reports on persons who have committed no crime."[2] He warned against their use when making street-level determinations on who to stop and detain.[3] Since then, the use of gang databases—specifically California's statewide shared gang database, CalGang—has increased dramatically, with over 200,000 people tracked in the database

[1] The ACLU of California is comprised of the ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego & Imperial Counties.
[2] *See* A.B. 90, 2017-2018 Leg. Sess. (Cal. 2017), Ass. Comm. on Pub. Safety, Committee Analysis ("Pub. Safety Committee Report"), at 6; *see also* Bill Lockyer, *Letters to the Editor: Lockyer* Responds, SFGATE, Aug. 5, 1999, https://www.sfgate.com/opinion/letterstoeditor/amp/Letters-to-the-Editor-2915623.php.
[3] Id.

accessible by over 6,000 individual law enforcement officials.[4] It also reflects racial disparity in law enforcement's labeling of individuals as gang members: over 65 percent of those included in CalGang are Hispanic or Latino, almost 24 percent are Black and under 7 percent white.[5] These statistics do not reflect the population demographics of California: statewide, Hispanic or Latino people and Black people comprise only 39.1 percent and 6.5 percent of the population, respectively, while white people make up 72.4 percent.[6] Placement in CalGang holds severe consequences for the individual included, both immediate—impacting how law enforcement engage with those they encounter on the street and believe to be gang members—and long term—influencing decisions such as whether to grant bail or adjust an individual's immigration status.[7] The existence of databases that surveil and track individuals on the basis of perceived membership in an organization poses a serious threat to those included within them. Despite these serious repercussions, police made the decision to identify someone as suspected gang members for inclusion in CalGang not on the basis of their criminal activity, but on vague and highly subjective interpretation of noncriminal activity such as perceived associations that allowed police broad discretion to add individuals who lived in neighborhoods with alleged gang activity or who grew up with family or neighbors who later became gang members or suspected gang members. The State Auditor's CalGang report showed that the vague and subjective criteria for inclusion had led to highly overbroad inclusion in the database and demonstrated the pressing need for rigorous oversight of these databases and strict regulations that limit their scope and access.[8]

With A.B. 90, the Legislature moved to address that need, as well as to respond to public outcry from those who have been personally affected by inclusion in the CalGang database and the release of a detailed state audit showing a myriad of issues. Among many issues, the state audit found an absence of meaningful oversight and an overinclusion of individuals within the database, caused by both adding individuals to the database without a substantiated factual basis and retaining them past the approved deadline for removal.[9] A.B. 90 and the related statutes from earlier legislative sessions—S.B. 458 and A.B. 2298—directly create protections for individuals whom law enforcement seeks to add to gang databases. It also directs the Department of Justice (DOJ) to adopt further regulations to safeguard access to these databases and increase the fairness and accuracy of these databases by ensuring that decisions on who gets added and how long they remain are based in evidence and are intended to be limited in scope.

We appreciate the effort expended in creating these regulations by DOJ staff, the CalGang Technical Advisory Committee, and members of the public who have participated in this process. However, the proposed regulations fall far short of the legislative purpose of improving the fairness and

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[4] See California Department of Justice, ATTORNEY GENERAL'S ANNUAL REPORT ON CALGANG FOR 2018 at 5, https://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/ag-annual-report-calgang-2018.pdf#page=5 (accessed on June 12, 2019).

[5] *The CalGang Criminal Intelligence System: As the Result of Its Weak Oversight Structure, It Contains Questionable Information that May Violate Individuals' Privacy Rights* ("CalGang Audit"), CALIFORNIA STATE AUDITOR, Aug. 2016, at 12, - https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf.

[6] QuickFacts: California, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/CA (accessed on 6/10/2019).

[7] *See, e.g.,* CalGang Audit at 36.

[8] CalGang Audit at 3.

[9] Pub. Safety Committee Report at 8.

accuracy of gang databases, do not satisfy the Legislature's specific instructions to ground these regulations in existing evidence, and in some cases directly conflict with the authorizing legislation. We submit these comments to object to certain proposed provisions and to recommend specific changes to the proposed regulations, which we believe more accurately reflect the Legislature's intent and are consistent with the requirements imposed on the DOJ by A.B. 90 and existing law.

General Recommendations

I. The proposed regulations ignore the explicit purpose of A.B. 90 to ensure fairness and accuracy in gang databases by establishing criteria and retention periods that are evidence-based and not overbroad.

When the Legislature delegated to the DOJ the task of creating regulations regarding criteria and retention periods, it specifically required that it create regulations that "are unambiguous, not overbroad, and consistent with empirical research on gangs and gang membership." Penal Code §§ 186.36(l)(2)-(3). Unfortunately, the regulations often fail to conform to these principles. In its Initial Statement of Reasons ("SOR"), the DOJ provides two stated purposes for the criteria section: 1) to list all criteria in a single section for clarity and 2) to "codify existing designation criteria." While including all of the criteria in one section serves a practical purpose, there is nothing in A.B. 90's text or legislative history to suggest that the Legislature intended the regulations to retain or codify the pre-existing criteria for inclusion in a gang database. To the contrary, A.B. 90 was enacted in response to public criticisms that the existing policies allowing law enforcement to designate individuals as gang members were overbroad and incorrectly swept in individuals who were not gang affiliated[10] and findings by the California State Auditor that CalGang was "tracking people who do not appear to justifiably belong in the system."[11] Thus the intent of A.B. 90 and expressly stated directions to the DOJ in creating these regulations was to increase the accuracy of gang databases by developing *new* designation criteria that would replace the ambiguous and overbroad criteria that were not consistent with empirical research.

Despite this clear record regarding A.B. 90's overall purpose, neither increasing the accuracy of the database or ensuring that those who are not gang-affiliated are excluded from the database was stated as one of the purposes of the criteria section. Additionally, the justifications provided for most of the individual criteria did not reference any empirical basis for its inclusion. Indeed, in many instances the criteria are in direct contradiction to the DOJ's own empirical literature review. As the DOJ's research assessment observed:

> One of the difficulties inherent in identifying gang membership for the purposes of inclusion in a database are concerns regarding overinclusion and underinclusion. In research parlance, misidentification of gang members is either a Type 1 error (false positive) or a Type 2 error (false negative). A Type 1 error occurs when a non-gang member is designated as a gang member in the database. . . . Type 1 errors are

[10] *See, e.g.*, Pub. Safety Committee Report, at 6-7.
[11] Id. at 8.

addressed in The Fair and Accurate Gang Database Act of 2017 mandate that criteria are "not overbroad."[12]

Despite this clear recognition of the purposes of these regulations, the criteria and retention periods proposed introduce numerous Type I errors by relying on observations that apply to wide swaths of the populations and make it difficult for those who reside in Black and Latino communities—already overrepresented in CalGang—to avoid this labeling. Instead of an approach grounded in empirical evidence in order to limit Type 1 errors, these regulations appear to default to the existing criteria already deemed overinclusive by the Legislature, or to ignore the existing empirical evidence altogether. In doing so, the regulations overlook the need to protect the privacy rights of individuals and ensure that individuals are excluded from the database absent sufficient evidence to establish a reasonable suspicion of gang membership—the purposes of enacting A.B. 90. The resultant regulations around criteria and retention therefore ultimately conflict with the express instructions of the Legislature, the purposes of A.B. 90, and the DOJ's obligation to adopt policies that are most effective at carrying out the purposes of the legislation.

II. The proposed regulations undercut the specific protections mandated by the Legislature intended to create fairness and accuracy in gang database

While the Legislature delegated to the DOJ responsibility to create certain regulations, A.B. 90 itself included specific protections for members of the public—both prior and subsequent to inclusion in the database. A number of the DOJ regulations directly contradict or scale back these protections and are therefore inconsistent with the purposes of the legislation and existing law. For instance, the statute imposes clear statutory limits on the evidence that a Superior Court may consider when determining whether to remove an individual from the database to ensure that a petitioner has the opportunity to contest the evidence against them.[13] Despite this clear mandate, the regulations appear to sanction law enforcement agencies presenting information in opposition to a petition for removal that it has not previously disclosed to the petitioner.[14] This provision undermines the express due process protections of the statute.

Additionally, A.B. 90, enacted against the backdrop of increased immigration enforcement activities and the same concerns about sharing information regarding immigration status with outside agencies that led to the enactment of S.B. 54,[15] also limited access to law enforcement agencies outside of California—including federal agencies. The regulations circumvent these protections by granting the DOJ authority to give out-of-state and federal agencies direct access to the CalGang database.[16] This not only exceeds the authority granted to the DOJ under the statute, but undermines the

[12] Todd C. Heistand, GANG MEMBERSHIP, DURATION, AND DESISTANCE: EMPIRICAL LITERATURE REVIEW 10-11.
[13] *See* Penal Code Section 186.35(c).
[14] See Department of Justice Regulations for the Fair and Accurate Governance of the CalGang Database, Title 11, Division 1, Chapter 7.5 ("CalGang Regulations") § 753.6(i)(1)), § 754(d)(1)).
[15] *See* A.B. 90, 2017-2018 Leg. Sess. (Cal. 2017), Assembly Floor Analysis, at 2 ("Any records contained in a shared gang database are not disclosed for purposes of enforcing federal immigration law, unless required by state or federal statute or regulation.")
[16] See CalGang Regs § 750.8.

protections the Legislature thought necessary to limit the transmission of "fact-based or uncorroborated information" that results in a designation of gang membership.[17]

III. The proposed regulations for shared gang databases other than CalGang needlessly remove basic provisions to ensure protections and oversight.

Although CalGang is the only shared gang database currently operating in California, the statute tasks the DOJ with developing regulations that would apply to any shared gang database that exists or may be created. In creating parallel regulations to apply to other shared gang databases, the DOJ largely adopted the same guidelines that apply to CalGang, but removed certain provisions intended to protect individuals' rights without providing any justification. We recommend that these provisions—present in the CalGang regulations—be incorporated into the regulations in Department of Justice Regulations for the Fair and Accurate Governance of Shared Gang Databases, Title 11, Division 1, Chapter 7.6 ("Shared Database Regulations").

Specifically, we recommend adopting the following sections from Chapter 7.5 into Chapter 7.6:

- 750.6(e) – Requiring that agencies demonstrate a need and right to know before access can be granted and provide information about who, within that agency, would have access to the database
- 751.2 – Providing guidance for monitoring the use of gang databases
- 755.2 – Requiring audits at least three times per calendar year, rather than once a year
- 756 – Imposing limits on the sharing of paper records
- 756.8 – Requiring that an investigation into allegations of misuse be initiated within five days, rather than providing no timeline for a mandatory investigation

Reinstating these provisions would further the purposes of A.B. 90 to ensure fairness and accuracy in gang databases and ensure that privacy rights of individuals remain protected. Moreover, if these regulations are deemed necessary to fulfill the purposes of the Legislation with respect to CalGang, this justification should apply equally to all gang database regulations, particularly given the potential for another system to replace or outpace the existing CalGang system.

Specific Comments on Proposed Regulations[18]

a. Criteria to be Designated as a Gang Member or a Gang Associate

i. The person has been arrested for an offense consistent with gang activity (CalGang Regulations, Art. 5, § 752.4(a)(2))[19]

The CalGang Regulations, Art. 5, Section 752.4(a)(2) and their counterpart in the Shared Database Regulations both allow police to use evidence that "[t]he person has been arrested for an offense consistent with gang activity" as a criterion for inclusion in CalGang or other shared gang

[17] Penal Code § 186.34(a)(2) (defining gang database).

[18] The regulations applicable to other shared gang databases in Chapter 7.6 largely mirror the language of the CalGang regulations in Chapter 7.5, and our comments regarding the similar provisions in Chapter 7.6 are the same. Where applicable, we will indicate the corresponding regulation in Chapter 7.6 and intend for our comments to apply to those provisions as well.

[19] These comments also apply to the similar provision in Shared Databases Regulations, Art. 5, § 771.6(a)(2).

databases. This criterion is overinclusive, because (1) a mere allegation that an individual committed one of the enumerated offenses is not sufficient evidence of their participation in gang activity, and (2) the offenses enumerated in the definition of "offense consistent with gang activity" includes offenses committed by non-gang members.

First, an arrest without conviction does not provide a reliable indication of criminality that could justify use of this criterion. Although the police may arrest an individual for a particular offense, prosecutors may charge the individual with a lesser crime, or jury may convict of the individual lesser crime or choose not to convict at all. Relying on convictions, rather than arrests, would ensure that sufficient proof that the individual actually committed the crime and the conduct is actually gang-related, instead of simply relying on potentially unfounded assertions. This criterion as it is written is over-inclusive because it would allow police to collect the information of people who were merely arrested. It therefore contradicts the Legislature's instruction to create regulations that are not overbroad.

Second, the definition of "offense consistent with gang activity" will sweep up too many people who are not gang participants because it seems to include every offense listed in subdivision (e) of Penal Code 186.22. Subdivision (e) defines the term "pattern of criminal gang activity," which is used in subdivision (a). The Department of Justice may have meant this criterion to apply to arrests for subdivision (a) that also meet the definition in subdivision (e); however, the language of the proposed rule implies that any person who commits two of the enumerated offenses would satisfy the criterion. This would be overbroad: recognized gang expert Dr. James Diego Vigil identifies drug use and sales, theft, and even violent crime such as assaults or robberies, as weak indicators have gang membership without evidence that the individual is sharing the profits of the crime with gang members — because both gang members and non-gang members commit those crimes.[20] Indeed, police frequently allege an individual committed a crime for the benefit of the gang, simply because they suspect the individual to be a gang member. This is circular logic and is not probative of gang membership.[21]

We recommend that this provision be limited to convictions rather than arrests. Alternatively, if this criterion continues to refer to arrests rather than convictions, we recommend that the definition of "offense consistent with gang activity" be limited to those offenses that are listed in subdivision (a) of the Penal Code section 186.22; Penal Code section 186.26 or 186.28, or where there is clear evidence that the individual committed the crime not merely with other gang members, but in furtherance of the gang."

ii. **The person has been identified as a Gang Member or Gang Associate by a reliable source** (CalGang Regulations, Art. 5, Sec. 752.4(a)(3))[22]

This provision allows law enforcement to use as a criterion for inclusion in CalGang an observation that "the person has been identified as a Gang Member or a Gang Associate by a reliable source." But the criterion does not define what makes a source "reliable" nor what factual evidence a source

[20] See attached Declaration of James Diego Vigil at ¶ 29.
[21] See attached Declaration of James Diego Vigil at ¶ 28.
[22] These comments also apply to the similar provision in Shared Database Regulations, Art. 5, Sec. 771.6(a)(3).

could consider to render judgment on whether a person is a gang member. By allowing law enforcement to rely on a third party's opinion, this criterion would allow subjective opinions to substitute for evidence that can be challenged in audits and petitions for removal because the regulations allow police to simply claim a source's information to be reliable, rather than requiring police to demonstrate the basis for the source's opinion.

The express purpose of these regulations is to ensure the accuracy of gang databases by eliminating inclusion based on unsubstantiated assertions.[23] In the context of court cases, to the extent a lay person may be able to opine on gang membership, courts reject such opinions that are not based on the witness's personal observations, because an opinion is unreliable without a sufficient factual basis.[24] In *People v. Jones*, for example, the trial court excluded the lay opinion of a witness who opined that the defendant was no longer a gang member based on his discussions with the defendant, gang members, and others in the community, because the discussions were inadmissible hearsay and thus unreliable as the basis for lay opinion.[25] In the context of the gang databases, if a source based their opinion on prohibited criteria, such as jail classification and presence in gang neighborhoods, the opinion would be unreliable because the underlying basis is known to be unreliable. An auditor or individual petitioning for removal, however, could not challenge the unreliability of the opinion because the provision fails to require police to demonstrate the basis for the source's opinion. Thus, entry of individuals based on prohibited criteria would make the database inaccurate, since police could rely on evidence known to be unreliable.

Additionally, the definition of "reliable source" should exclude children under 18 years old. Courts have recognized that youth have lessened ability to assess the consequences of their actions.[26] Children may incorrectly identify people they know as gang members not understanding how this identification will have serious consequences for those people. They may even mistakenly inform on their own siblings, parents, and relatives if they do not understand the nature of gang membership or the de-stabilizing effect their actions may have on family dynamics.

We recommend that identification by a reliable source should be removed as an independent criterion. To the extent an individual can be added to a gang database based on observations made outside of the presence of the law enforcement officials ultimately responsible for their inclusion in the gang database, "reliable sources" should only be a permissible form of source data, confirming the presence of one or more listed criteria that should go in a separate source document provision.

iii. **The person has been seen associating with persons meeting the criteria for entry or who have previously been entered as a Gang Member into the CalGang database** (CalGang Regulations, Art. 5, Sec. 752.4(a)(4))[27]

[23] Pub. Safety Committee Report at 6

[24] *People v. Jones*, 3 Cal.5th 583, 602 (2017); *People v. McAlpin*, 53 Cal.3d 1289, 1308 (1991).

[25] *People v. Jones*, 3 Cal.5th 583, 602 (2017).

[26] *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

[27] These comments also apply to the similar provision in Shared Databases Regulations, Art. 5, Sec. 771.6(a)(4).

This provision allows law enforcement to use as a criterion for inclusion in CalGang an observation that "[t]he person has been seen associating with persons meeting the criteria for entry or who have previously been entered as a Gang Member into the CalGang database." The proposed regulations simply repeat the broadest, most problematic of the existing designation criteria, despite the recognition in both case law and the DOJ's own evidence that it is overinclusive. This criterion should be removed or dramatically altered.

Mere association with someone designated as a gang member is one of the weakest indicators of gang membership. As case law has recognized, "gang members and nonmembers often grow up together in the same neighborhood and have social relationships and friendships unrelated to the gang."[28] The difficulty disentangling innocuous social relationships from those that reflect gang membership was also cited in the legislative history for A.B. 90.[29] And as the DOJ's research assessment notes, even after individuals disengage from a gang and are no longer members, some of the same social ties may remain.[30] Thus continued association with gang members may not be probative of current gang membership.

The regulations place no context-based limitation on the nature of the association used to satisfy this criterion. As a result, individuals who associate because of familial or intimate relations, professional relations including mentorship or gang interventionist work, scholastic pursuits, recreational activity, volunteer associations, or even religious ties to the same institution satisfy this criterion to be included as gang members or associates. The inclusion of individuals on this basis is not hypothetical, as law enforcement representatives on the CalGang Technical Advisory Committee acknowledged using such relationships as the basis for including individuals into CalGang,[31] and individuals have shared their personal experiences of being added to the database on these grounds.[32]

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[28] *Vasquez v. Rackauckas*, 203 F.Supp.3d 1061, 1072 (C.D. Cal. 2011), aff'd in part, rev'd in part and remanded, 734 F.3d 1025 (9th Cir. 2013); *see also People v. Sanchez*, 18 Cal. App. 5th 727, 751 (2017) (". . . this factor [associating with gang members] is difficult to apply in practice because a person's familial and social relationships can be misperceived as gang-related relationships and result in misidentification of that person as an active gang member.").

[29] Pub. Safety Committee Report at 6 (observing that it is difficult for youth in communities where gangs are present to avoid satisfying associational criteria, particularly when social media may be used as source documentation).

[30] Heistand at 22.

[31] Numerous comments by law enforcement representatives on the CalGang Technical Advisory Committee cited reliance on these types of relationships to satisfy criteria including intimate relations and mentorships. Gang Database Technical Advisory Committee, Meeting Minutes at 19 ("Sept. 19 Minutes"), Sept. 19, 2018 (Eric McBride [representing Jarrod Burguan, designee of the President of the California Police Chiefs Association] states that an associate is "not identifying someone as a gang member. . . .What its saying is that might be someone is not an active gang member, doesn't participate, and maybe even an older person . . . [m]aybe they open their house or backyard for them . . . They are associating with them. . . . It is an intelligence network that allows to identify people that are associates and help us at the end of the day, solve crime. . . . Hanging out with someone is associating with them. . . . In the argument of the girlfriend, you're saying she is an associate. She lives with him, maybe has kids with him, to me that makes her an associate."); Sept. 19 Minutes, at 20 (Eric McBride [representing Jarrod Burguan, designee of the President of the California Police Chiefs Association] states that "[f]or the purposes of intelligence, say you are mentoring a young person that is a gang member. On Friday you mentor that person, for intelligence purposes it would be important for law enforcement to know that if we are actively looking for that person, its likely that they may show up with someone they associate with.").

[32] For example, a 30-year-old man with no criminal history was added to the gang database after giving a ride to a high school classmate he had seen only once in over a decade and whom he had no knowledge the police alleged was a

Trivial associations such as presence in the same public space are also used to satisfy this criteria, as has been noted by advocates who have reviewed the source documentation created by law enforcement to support associational criteria.[33]

To support the inclusion of this criterion, the DOJ's SOR only states that unnamed "[l]aw enforcement officials . . . asserted that, based on their extensive knowledge and history with gang members, association with gang members is a strong indicator of a person being involved in, or associated with, a gang."[34] The DOJ apparently relied on the anecdotal and unverified statements of a subset of law enforcement representatives as the sole basis for this criterion and failed to consider any of the empirical research or legal case law reliant on empirical evidence cited by experts as mandated by statute. Reliance on law enforcement's representations that association with gang members is a "strong indicator" of gang involvement or association is also belied by contrary assertions made by law enforcement[35] at public hearings, where they stated that they would use the "association" criteria to justify adding to the database individuals they know are not active gang members but are merely non-gang associates of a documented gang member, including mentors and significant others.

Individuals associate knowingly or unknowingly with those who happen to be gang members—or who have met the criteria within the last several years—for a variety of reasons that have nothing to do with an underlying shared membership in a gang. Despite the wide range of reasons why individuals associate with one another, the DOJ has cited no empirical research to support a conclusion that being in the presence of someone who is a gang member is highly probative of gang membership, or that an individual in the presence of a gang member is more likely than not to be a gang member themselves. The express directions provided to the DOJ by the Legislature was to establish criteria that "are unambiguous, not overbroad and consistent with empirical research on gangs and gang membership."[36] This criterion fails on all accounts by allowing the gang database to sweep in any individuals who have any interactions with an alleged gang member whatsoever, regardless of how fleeting or innocuous without providing any empirical justification for that provision.

We recommend removing this criterion completely. If the Department wishes to include association as a criterion, we recommend defining this criterion to apply only if a "person has been ***convicted in***

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gang member. Administrative Record at AR007-AR008, *Allen v. Los Angeles Police Department* (Los Angeles Sup. Ct. J9STCPO1979).

[33] Gang Database Technical Advisory Committee, Meeting Minutes ("Dec. 13 Minutes") at 102:8-17, Dec. 13, 2018 (Sean Garcia-Leys, an attorney at Urban Peace Institute, describes how police allege his client satisfied the association criteria because he was present in the same park as an alleged gang member, "The association was being in the same park, 20 to 50 feet away. And even if they had talked, right, this is somebody that they went to elementary school together. He was revisiting his old neighborhood for the first time. I was a little surprised that they didn't talk. But knowing the personal dynamics between them, it makes sense.")

[34] SOR at 16.

[35] The DOJ did not state the law enforcement representatives that provided this opinion, so the record is unclear whether it is the same representatives who participate in the CalGang Technical Advisory Committee that made conflicting statements at the public hearings.

[36] Penal Code § 186.36(l)(2).

the commission of gang-related crime with persons meeting the criteria for entry or who have previously been entered as a Gang Member into the CalGang database." This is similar to the criterion as it existed before these proposed regulations—although not strictly followed by law enforcement[37]—and is at least consistent with case law that recognizes association in the context of gang-related criminal activity to be probative of active gang membership[38].

iv. **The person has been seen at one or more gang-related addresses or locations** (CalGang Regulations, Art. 5, Sec. 752.4(a)(6))[39]

This provision allows law enforcement to use as a criterion for inclusion in CalGang an observation that "the person has been seen at one or more gang-related addresses or locations." We object to this provision. Allowing an individual's presence in a geographic area, including an undefined gang-related "location," conflicts with the express provisions of A.B. 90, which specifically identifies presence in a "gang neighborhood" as an impermissible criterion for gang database inclusion.

The CalGang policies that predated the enactment of A.B. 90 listed 10 criteria that, if satisfied, could allow an individual to be added to the database.[40] A.B. 90 mandated law enforcement agencies eliminate entries from any shared gang database that relied upon three of those ten criteria: "[admissions of membership made in] jail classification [interview], frequenting gang neighborhoods, or . . . [identification by] untested informant," Penal Code §186.36(r)(1). It further required agencies to purge records of individuals whose remaining entries were "not sufficient to support the person's designation" as a suspected gang member after those entries were removed, and prohibited agencies from adding any new records to a shared gang database that did not meet the "criteria established by the conditions of the purge." Penal Code §§186.36(r)(1)-(s)(1). Penal Code Sections 186.36(r)-(s) therefore explicitly recognize that mere presence in a purported "gang neighborhood" is an insufficient ground to infer gang membership, and requires agencies to purge entries based on this criterion and prohibits them from relying on this criterion in the future.[41] The proposed regulations directly contradict this command by making minor alterations in the language,

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[37] SOR at 16.

[38] *People v. Martinez*, 158 Cal. App. 4th 1324, 1331 (2008) (finding sufficient evidence of active gang participation where individual had numerous gang tattoos, admitted gang membership, gave gang moniker when arrested, and was associating with an alleged gang member when he was arrested for gang-related crime).

[39] These comments also apply to the similar provision in Shared Database Regulations, Art. 5, Sec. 771.6(a)(6).

[40] *See* California Gang Node Advisory Committee, *Policy and Procedures for the CalGang System*, Sept. 27, 2007, https://assets.documentcloud.org/documents/2298514/calgangs-policy-procedure.pdf.

[41] While the statutorily prohibited criteria refer to frequenting "gang neighborhoods" and the LAPD's checklist references "gang areas," this slight difference in language is not substantively meaningful. These terms are not defined or limited in statute or policy, and there is no basis to conclude that "gang area" is substantively different than "gang neighborhood." Moreover, the CalGang policy manual setting forth the applicable criteria similarly uses the term "gang areas," and the A.B. 90 purge—which was enacted after a CalGang audit found significant errors—was enacted to improve the reliability of existing databases. *See* Pub. Safety Committee Report at 7-8. If "gang area" and "gang neighborhood" were intended to refer to different criteria, the latter's inclusion as the basis for the purge would have had no effect as it was not one of the existing criteria used by law enforcement. *See In re T.J.*, 185 Cal. App. 4th 1504, 1512 (2010) (construction of statute that would cause provisions to have no effect should be avoided, because "[e]very statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.") (internal citation omitted). In the absence of any statutory definition for the two terms, they should be presumed to refer to the same general concept.

while still permitting law enforcement to rely on presence in a geographic area to justify inclusion in a gang database.

Allowing law enforcement to rely on an individual's presence within a "gang-related address or location" as evidence of gang membership is also contrary to empirical research, evidence cited in the legislative record, and case law, which recognizes that presence in a particular geographic area alleged to be a gang area may easily be explained by reasons having nothing to do with gang associations.[42] On "gang areas," noted gang expert Dr. Vigil[43] states, "[v]ery little weight should be given to presence in a 'gang area' as an indicator of gang membership, even if the 'gang area' is narrowly drawn. California's urban centers are an overlapping maze of gang territories. . . . Even when only specific intersections or housing complexes are identified as 'gang areas,' most individuals in those areas are typically not gang members."[44] For example, the Los Angeles Sheriff's Department map of Century Station gang areas depicts almost the entire area covered by the map as gang areas.[45] The arguments incorporated into the Public Safety Committee Report recognized the impact specifically on noncitizen immigrants because as "people of color [they] . . . also live in neighborhoods with gang injunctions or where gang activity may be high . . . [which] places these individuals at greater risk of being placed on a shared gang database solely for where they live."[46] And the authors of the report themselves noted that gang database criteria that relies in part on geographic location—particularly when in conjunction with mere association—makes it "difficult for a minor, or young adult, living in a gang-heavy community to avoid qualifying criteria."[47] The DOJ cited no evidence to support its position that the locations or addresses that law enforcement define as "gang-related" are solely or predominately frequented by individuals who are active members, such that mere presence in such an area is evidence of gang membership or association. To the contrary, the evidentiary record underscores the fact that such criterion are overbroad and sweep in substantial numbers of people with no gang affiliation.

Finally, the DOJ's stated rationale for including "gang locations" is flawed and contrary to the legal principles on which they purportedly rely. In its SOR, DOJ justifies inclusion of this criteria as necessary "because gang addresses and locations are designated as such due to their high gang presence"—without ever stating what is meant by "addresses" or "locations." It continues by stating that "by including gang locations/addresses that a person must stay away from in gang injunctions the courts have established the existence of gang locations/addresses. Thus, presence at a gang address or location is a strong indicator of gang membership and association."[48]

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[42] *See, e.g., Vasquez v. Rackauckas*, 203 F.Supp.3d 1061, 1072 (C.D. Cal. 2011) (recognizing that growing up in a particular neighborhood and the social relationships that stem from that are not necessarily evidence of gang activity).
[43] The Ninth Circuit relied on Dr. Vigil's expert testimony in *Vasquez v. Raukauckas*, 734 F.3d 1025, 1046-47 (9th Cir. 2013). He is a retired Professor of Criminology, Law, & Society at the University of California, Irvine, who has authored eight books, five of which have focused on street gangs, and more than sixty articles in journals and edited books, most of which emphasize street gang and street youth.
[44] See attached Declaration of James Diego Vigil at ¶ 48.
[45] *See* attached LASD Century Station Gangs Map.
[46] Public Safety Committee Report at 10.
[47] Public Safety Committee Report at 6.
[48] SOR at 17.

The DOJ appears to be referencing the existence of gang injunction "Safety Zones"—which reflect the geographic area where a gang injunction is operative, and within which, those subject to a gang injunction have limited freedoms.[49] In the context of gang injunctions, presence or residence within a safety zone is not evidence of active participation in a gang. Rather, safety zones are a mechanism to limit the enforcement of a gang injunction to a finite area.[50] These alleged "gang locations" can encompass huge swaths of the community, and a presumption that mere presence in those areas is a "strong indicator" of gang membership is completely unfounded and is overbroad as a gang database criterion. First, the premise of gang injunctions belies the DOJ's argument that presence in a Safety Zone is a "strong indicator" of gang membership, because gang injunctions are granted on the grounds that the activities of a comparatively few individuals—residents or not—"interfere with the comfortable enjoyment of life . . . by an entire *community or neighborhood*, or by any *considerable number* of persons."[51] Whether successful or not, gang injunctions are intended to recognize "the value of community and the collective interests it furthers," by protecting the *majority* of community members *who are not members of the gang*.[52] To use one's presence or residence in a Safety Zone as evidence of gang membership would be contrary to the very legal definition of such an area because its existence relies on the fact that most of those who reside in the area are not, in fact, active members of the gang. The fact that gang injunction Safety Zones exist and purportedly reflect areas where there is a non-trivial presence of gang activity does not at all support the DOJ's position that presence in that area is a strong indicator of gang membership or association.

Second, the reality of gang injunctions and safety zones underscores that the reliance of "gang-related addresses and locations" results in overbroad criteria. For example, Safety Zones often include entire neighborhoods; a single injunction in Los Angeles' San Fernando Valley covers 10 square miles.[53] Even injunctions limited to addresses may encompass entire housing projects and include primarily individuals who would not otherwise be alleged to be gang members. Even a single-family home where an alleged gang member resides may be overbroad as this criteria would also include parents, siblings, extended family and any of their visitors. To further demonstrate the overbreadth that would result from allowing "gang-related address and locations" to serve as a criterion, in 2008 the City of Los Angeles had approximately 36 gang injunctions, and the Safety Zones from these injunctions encompassed more than 75 square miles—15 percent of the entire City of Los Angeles—and it has obtained ten more injunctions since that time, further increasing the

[49] For instance, those subject to a gang injunction may be prohibited from associating in public with other individuals the police allege to be gang members—including family members—or from possessing certain items like pagers, or pens in those areas.

[50] *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1123 (1997) (". . . here the injunction is confined, encompassing conduct occurring within a narrow, four-block residential neighborhood.") (internal quotation marks omitted).

[51] *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1104 (1997) (emphasis in original) (internal citation and quotation marks omitted).

[52] *Id.* at p. 1109.

[53] Complaint for Declaratory and Injunctive Relief, *Youth Justice Coalition, et al. v. City of Los Angeles, et al.*, Case No. 2:16-cv-07932, at 5 (Oct. 25, 2016); Complaint for Declaratory and Injunctive Relief, *Youth Justice Coalition, et al. v. City of Los Angeles, et al.*, Case No. 2:16-cv-07932, at 5 note 2 (Oct. 25, 2016). *See also People v. Puente 13 and Bassett Grande* (LA Super. Ct. BC457055 (2011); *People v. Fullerton Tokers Town* (Orange Super. Ct. 30-2011-00449392 (2011)); *People v. Longos and Surenos* (LA Super. Ct. NC056071 (2011)); *People v. Rancho San Pedro* (LA Super. Ct. BC460412 (2011))

percentage of the city designated Safety Zones.[54] The Los Angeles Police Department contends that, in a city of approximately 4 million there are about 45,000 gang members,[55] yet 15 percent of the City of Los Angeles includes nearly 600,000 people.[56] Presuming both the accuracy of LAPD's estimate and an equal distribution of purported gang members across the various Safety Zones, less than eight percent of those residing in Safety Zones are likely to be members of a gang, yet this criterion would authorize police to designate 600,000 people as suspected gang members. This also presumes that the areas police would designate as "gang locations" are limited to those already recognized under existing injunctions as Safety Zones—but the regulations permit law enforcement to denote any area or address as a "gang location," which means that the geographic area that sweeps people in is even greater than the that the total number of people who may be deemed to satisfy this criterion simply for living in or passing through an area is much higher than 600,000 individuals. This criterion allows for criminalizing entire communities because of alleged gang activity within their borders and makes it nearly impossible for someone who resides in such an area to avoid inclusion in the gang database—and would allow anyone who was ever included in the database to remain a documented gang member indefinitely as long as they live in, frequent, or pass through such an area. Allowing the regulations to include presence in a geographic area as a criterion for inclusion is contrary to the underlying purposes of the statute to limit the breadth of criteria and increase their accuracy and is therefore not necessary to effectuate its purpose.

Finally, even if the "gang location" were more specific than a neighborhood, the criteria do nothing to define how officers should identify a particular place as a "gang location." This criterion therefore just replaces officers' subjective judgments about who is a gang member with equally subjective judgements about what is a "gang location," and therefore does nothing to help address ambiguity or overbreadth.

We strongly urge that the DOJ remove this criterion entirely.

v. **This person has been seen wearing a style of dress or accessory that is tied to a specific criminal street gang.** (CalGang Regulations, Art. 5, Sec. 752.4(a)(7))[57]

Part (a)(7) of Section 752.4 and Section 771.6 allow police agencies to use evidence that "[t]he person has been seen wearing a style of dress or accessory that is tied to a specific criminal street gang" as a criterion for inclusion. The provisions further specify that the officers must "document the specific items and to which criminal street gang the style of dress and/or accessory is related."[58]

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[54] Complaint for Declaratory and Injunctive Relief, *Youth Justice Coalition, et al. v. City of Los Angeles, et al.*, Case No. 2:16-cv-07932, at 6 (Oct. 25, 2016).

[55] *Gangs*, THE LOS ANGELES POLICE DEPARTMENT, http://www.lapdonline.org/get_informed/content_basic_view/1396.

[56] The number of individuals living in Safety Zones is probably substantially higher than merely 15 percent of the Los Angeles population, given that many of the areas covered are high density. *See* Citywide Gang Injunctions, THE LOS ANGELES POLICE DEPARTMENT, http://assets.lapdonline.org/assets/pdf/COLUMBUS%20STREET%20GI%20gang_injun_citywide_85x11.pdf.

[57] These comments also apply to the similar provision in Shared Databases Regulations, Art. 5, Sec. 771.6(a)(7).

[58] CalGang Regulations, Art. 5, Sec. 752.4(a)(7); Shared Databases Regulations, Art. 5, Sec. 771.6(a)(7).

This criterion is a very weak indicator of gang membership, because of the overlap between urban culture and purported gang culture. Dr. Vigil identifies use of style of dress as a criterion as a "common source of error and should be given little weight," because "styles of dress such as baggy clothes . . . are cultural expressions shared by both gang members and non-gang members in urban neighborhoods."[59] Because this criterion would allow police to record in the database people who are not gang members, it is overinclusive and inaccurate. Because of the vagueness of the phrase "style of dress," police could use this criterion as evidence of membership no matter what the individual is wearing. For example, in our case *Youth Justice Coalition, et al. v. City of Los Angeles, et al.*, the City's gang expert, an LAPD gang detective, Officer Lamar, identified a button-down, plaid shirt; baggy shirt with shorts and socks; and a baggy shirt with Dickie pants all worn by plaintiff Peter Arellano as "gang attire," raising the question what could Peter have worn that would not be "gang style of dress."[60] For these reasons, this criterion would penalize urban culture, rather than accurately identify gang participants.

DOJ does not support its inclusion of this criteria with any empirical evidence that certain accessories or styles of dress are specifically tied to membership with a gang, rather than associated with young people of color who reside in urban neighborhoods. Nor have they cited any empirical evidence that individuals wearing certain colors or styles of dress in a particular geographic area are more likely to be gang members than not. The DOJ's SOR suggests that even wearing certain colors can be the basis for satisfying criteria.[61] While the SOR states that a color that is associated with multiple gangs would not provide a basis for inclusion, it makes no exception for the fact that individuals may have completely innocuous reasons for wearing any single color. Law enforcement's assertion that certain colors are associated with gangs is exceedingly broad, and, for example within a single neighborhood, they may allege that tan, beige, black, blue, and orange are all associated with a gang—making it very likely that non-gang affiliated individuals will be deemed wearing gang-related attire.[62] Even seemingly narrowly-defined gang attire—such as clothing bearing certain words or symbols—may be overbroad. In one instance, for example, clothing bearing the word "orange" was deemed to be gang-related for a gang in Orange County, in the City of Orange, where many alleged members attended Orange High School.[63] In Fullerton a gang injunction prohibits wearing California State University Fullerton or Fullerton college gear[64], and in another neighborhood, clothing bearing the name "Deep Side South Modesto" was where it was both the name of the community and the name of a gang present there.[65] The DOJ cites no evidence suggesting that non-gang affiliated individuals in a particular area are both aware of specific styles of dress or accessories that law enforcement believe are present in their community and refrain from

[59] *See* attached Declaration of James Diego Vigil at ¶ 46.
[60] Declaration of Officer Lamar in Support of Defendants' Opposition to Motion for Preliminary Injunction for Plaintiff Peter Arellano, *Youth Justice Coalition, et al. v. City of Los Angeles*, et al., Case No. 2:16-cv-07932-VBF-RAO, at 17-19 (Dec. 16, 2016), Dkt No. 41.
[61] SOR at 17.
[62] *See, e.g., Vasquez*, 734 F.3d at 1033 & n. 4 (noting that, in obtaining a gang injunction, law enforcement initially sought to enjoin alleged gang members from wearing any of these allegedly gang-associated colors).
[63] *Vasquez*, 734 F.3d at 1033
[64] *People v. Fullerton Tokers Town* (Orange Super. Ct. 30-2011-00449392 (2011)) Order for Permanent Injunction, Filed May 23, 2011 at 11:9-11:28.
[65] *Sanchez*, 18 Cal. App. 4th at 751.

wearing them—however there is evidence that such styles are likely to be shared by members and non-members alike, rending this criteria excessively overbroad.

We recommend removing this criterion. In the alternative, we recommend that it be amended to eliminate reference to a "style of dress" and require a specific worn item of clothing or accessory – not simply a color – that is tied to a specific criminal street gang.

b. Retention period for records (CalGang Regulations, Art. 9, Sec. 754.4)[66]

This provision allows a person's record to be retained in the CalGang database for up to five years, and, if a single additional criterion is added to the database, allows the five-year period to be reset. We strongly object to this provision.

First, the five-year retention length is unsupported by evidence and is contrary to the express directions provided to the DOJ under A.B. 90. The DOJ's SOR states that it is "maintaining the current five-year retention period for records in the CalGang database" because it "has not located any substantial research to justify reducing the retention period."[67] The DOJ's decision to codify the existing policies around CalGang is not justified by anything in the legislation or legislative history, and is against the direct instruction to develop retention policies that are supported by evidence. Penal Code Sec. 186.36(l)(3).

Second, the evidence cited in the DOJ's research assessment provides support for a much shorter retention period. The DOJ's SOR acknowledges that most of the research regarding length of membership focuses on youth.[68] The numerous studies cited in the research assessment consistently find that "periods of active gang membership rarely extend beyond one to two years," with most reports finding that the majority of youth remain in a gang for less than one year.[69] Given the DOJ's decision to allow youth as young as 13-years-old within the database, this empirical data should compel a retention period for youth limited to one year. The longitudinal data also shows that even when individuals joined gangs as adults, they "still reported short term gang membership with an average of 1.62 years in the gang."[70] Thus, even when limited to individuals joining gangs in adulthood, the empirical evidence does not support ongoing active membership lasting five years.

Finally, the regulations should not allow for the retention period to be reset every time a single criterion is satisfied, particularly if the DOJ adopts such overbroad and problematic criteria as associating with an alleged gang member, frequenting a gang location, and wearing "gang" style of dress. Retaining individuals within the database beyond their actual period of gang membership is yet another form of overbreadth recognized by the DOJ's research assessment,[71] and eliminating

[66] These comments also apply to the similar provision in Shared Databases Regulations, Art. 9, Sec. 773.6.
[67] SOR at 24-25.
[68] SOR at 24.
[69] Heistand at 20-21 (citing multiple studies finding that the majority of youth participate in gangs for less than a year); D. C. Pyrooz, G. Sweeten, and A. R. Piquero, *Continuity and change in gang membership and gang embeddedness*, 50(2) J. OF RES. IN CRIME AND DELINQ. 239, 244 (2013), https://doi.org/10.1177/0022427811434830.
[70] Heistand at 21.
[71] Heistand at 23 (recognizing "[o]verinclusion . . . can also occur on the back end by continuing to include former gang members who have de-identified and disengaged).

such overbreadth is one of the purposes of A.B. 90 and its accompanying regulations. Unnecessarily including individuals in a gang database beyond their actual period of gang membership is not a costless act. This is true whether caused by an initial retention period that is too long, or through repeated extensions of this retention period. As the DOJ's research assessment described, a large majority of individuals who have de-identified and disengaged with gangs nonetheless continue to be improperly labeled and treated as "gang members" by law enforcement—an experience they report occurring even more frequently than being targeted by a former or rival gang combined.[72] Such continued inclusion in the database "may negatively impact the process of disengaging," thus preventing individuals from desisting from criminal activity and engaging in pro-social activities, which is directly contrary to public safety.[73]

Allowing the retention period to reset every time an individual satisfies an additional criterion means that law enforcement agents will be permitted to keep individuals in the database even after the retention period has expired for the other criteria and may result in individuals remaining in the database based solely on satisfying a single criterion. For instance, under the current regulations, an individual may be added into the database on January 1, 2020 because they have been seen with someone already within the database while at his neighborhood park, which has been designated a "gang location." If, on December 1, 2024, this same person was observed in the same park, they would remain in the database until 2029—nearly five years based solely on their presence in a public space in their own neighborhood. Allowing such continued inclusion based on one criterion violates the requirements of 28 C.F.R. Part 23, because inclusion within a gang database must be based upon reasonable suspicion "that the individual is involved in criminal conduct or activity." Satisfying a single criterion—particularly something as overbroad as presence in a gang location or associating with another person who law enforcement alleges to be a gang member—is not alone sufficient to provide a factual basis for an officer's reasonable suspicion that an individual is involved in criminal conduct. Given the extensive information regarding the relatively short term of gang participation (typically lasting less than two years for those who join as adults and less than one year for those who join as youth),[74] it is inconsistent with research on individuals leaving gangs to allow law enforcement to rely on observations from years prior to serve as the basis for the conclusion that an individual is currently involved in a gang. Allowing an individual's database tenure to reset on the basis of a single observed criterion also makes it potentially impossible for individuals to term out of the database if they continue to live or work in an area that is deemed a "gang location" or have relatives or acquaintances that are within the database.

We recommend, at minimum that youth placed in the database while under 18-years-old remain in the database for no more than one year, and that the retention period for those entered as adults last no more than two years.

c. **Limitations to the Access Provided to an Out-of-State or Federal Agency** (CalGang Regulations, Art. 3, Sec. 750.8)[75]

[72] Heistand at 23 (This is probably not how it should be cited, but you can correct these later)
[73] Heistand at 23.
[74] Heistand at 20-21.
[75] These comments also apply to the similar provision in Shared Databases Regulations, Art. 3, Sec. 770.6.

This provision allows the DOJ to enter into a memorandum of understanding with an out-of-state or federal agency that would provide that agency with direct access to the CalGang database. However, nothing in A.B. 90 authorizes the DOJ to exercise such authority. The DOJ's SOR cites to Penal Code Sec. 186.36(l)(7) as authority for this provision, but this section only directs the DOJ to adopt "[p]olicies and procedures ***for sharing information from a shared gang database*** with a federal agency, multistate agency, or agency of another state ***that is otherwise denied access***. This includes sharing of information with a partner in a joint task force." The Legislature specifically directed the DOJ to adopt policies that would permit the sharing of certain information obtained from a shared gang database while direct access was denied, not policies for granting unfettered access to agencies that are not permitted access under the existing law. As such, the proposed regulation exceeds the scope of legislative authority and should be not be included in the final regulations.

Prohibiting federal and out-of-state agencies from having direct access to the CalGang database is also consistent with the concerns that underscored the need for the law to include limitations on sharing. As was cited in the Public Safety Committee hearings on A.B. 90, information regarding alleged gang associations can be introduced in proceedings regarding removal or adjustment of status, and mere allegations—including presence in the CalGang database regardless of the accuracy of the underlying source data—may be fatal to an individual's claim to remain in the United States.[76] And despite any limitations that an MOU may place on an individual federal agency, once information is transmitted to the federal government, federal law requires that it may be shared with any agency for immigration enforcement purposes[77]—thus overriding the limitations on sharing for such purposes expressly written into A.B. 90.[78]

The legislative command in Penal Code Sec. 186.36(l)(7) is more consistent with the regulations articulated in Art. 5, Section 751.6, which impose guidelines on the sharing of information obtained from databases with non-user agencies, and thus Section 750.8 is unnecessary as well as contradictory.

We recommend removing this provision.

d. **Minimum Age of Entry and Requirements to Enter a Person into the CalGang Database** (CalGang Regulations, Art. 5, Secs. 752.6(b)-(c))[79]

Subsection (b) of Section 752.6 and 770.6 set a two-criteria requirement for gang membership. Subsection (c) of those sections allows police to enter an individual as a gang associate if they meet the association criterion and one other criterion. According to the DOJ's SOR, these provisions,

[76] See public safety committee hearing on A.B. 90, April 18, 2017, testimony of Marissa Montes (this is at about 2:24:00+)—not sure what info is needed to cite to this.
[77] Testimony of Marissa Montes on A.B. 90, *Assembly Public Safety Committee*, The California Channel (April 18, 2017), http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=4397 at 2:24:30.
[78] *See* Penal Code § 186.36(k)(7); 186.36(w).
[79] These comments also apply to the similar provision in Shared Databases Regulations, Art. 3, Sec. 770.6.

purportedly "specify the standard for entry in the CalGang database" and are "consistent with [28 C.F.R. Sec. 23.20(a)]."[80] Neither of these provisions satisfy the requirements of 28 C.F.R. Sec. 23.20(a), which permits law enforcement agencies to "collect and maintain criminal intelligence information concerning an individual only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity." Gang membership alone is not a crime.[81] Thus, membership alone does not demonstrate reasonable suspicion of criminal conduct. Rather than requiring that there be reasonable suspicion that any individual added to CalGang is involved in criminal activity, the regulation only requires that "two criteria . . . are found to exist though investigation, based on a trained law enforcement officer's reasonable suspicion." Sec. 752.6(b). The regulations therefore do not require reasonable suspicion that the person listed is engaged in criminal activity—as mandated by 28 C.F.R. Sec. 23.20(a)—but rather only reasonable suspicion that two of the criteria set forth for establishing gang membership have been satisfied. The existence of the criteria merely formalizes the bases for law enforcements' assessment that an individual is a gang member; the mere presence of those traits is not in themselves sufficient to establish the necessary criminal predicate for inclusion in criminal intelligence database such as CalGang.

Additionally, law enforcement representatives on the CalGang Technical Advisory Committee acknowledged that the way that the current "associate" or "affiliate" category functions is to allow them to collect intelligence on individuals who they do not even contend are involved in criminal activity, but rather merely associate with people who are gang members.[82] They specifically cited using the associate or affiliate designation on individuals such as mentors, and intimate associates, such as a girlfriend who shares a home or children with an individual designated a gang member.[83] This is an improper use of the database and violates 28 C.F.R. Sec. 23.20(a), which, again, only authorizes the inclusion of personal information regarding individuals where there is "reasonable

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[80] SOR at 18.

[81] *See People v. Rodriguez*, 55 Cal.4th 1125, 1134 (because membership in a group is constitutional under S*cales v. United States*, 367 U.S. 203 (1961), Penal Code Section 186.22(a) penalizes commission of an underlying felony with at least one other gang member, rather than punishing gang membership).

[82] See, e.g., Transcript pg. 71-72 (LAPD Detective Cooper [accurate title?] states: "We can have a contact with somebody . . . the guy is a full-fledged member . . . . And the guy with him, he says 'I am not a member, I hang out with these guys,' he is an associate."); Sept. 19th minutes, p. 23 (Jonathan Feldman, representative for California Police Chiefs Association, states: "We talked about the fact that an associate is someone who's associating with an individual on a regular basis, but not doing something for the benefit of the gang."); Sept. 19th minutes, p. 24 (Jonathan Feldman, representative for California Police Chiefs Association, states: "If it is just an affiliate, they are not committing the criminal activity.")

[83] Sept. 19 Minutes at 19 (Eric McBride [representing Jarrod Burguan, designee of the President of the California Police Chiefs Association] states that an associate is "not identifying someone as a gang member. . . .What its saying is that might be someone is not an active gang member, doesn't participate, and maybe even an older person . . . [m]aybe they open their house or backyard for them . . . They are associating with them. . . . It is an intelligence network that allows to identify people that are associates and help us at the end of the day, solve crime. . . . Hanging out with someone is associating with them. . . . In the argument of the girlfriend, you're saying she is an associate. She lives with him, maybe has kids with him, to me that makes her an associate."); Sept. 19 Minutes, at 20 (Eric McBride [representing Jarrod Burguan, designee of the President of the California Police Chiefs Association] states that "[f]or the purposes of intelligence, say you are mentoring a young person that is a gang member. On Friday you mentor that person, for intelligence purposes it would be important for law enforcement to know that if we are actively looking for that person, its likely that they may show up with someone they associate with.").

suspicion that the individual ***is involved in criminal conduct or activity***." This is also inconsistent with the case law that recognizes that association, even with multiple members of a gang, cannot establish gang membership.[84]

Law enforcement do not even purport to adhere to these standards when choosing to include people in the database as associates or affiliates and must not be permitted to add individuals to the database without, at minimum, reasonable suspicion of actual criminal conduct or activity in association with the gang itself—not merely association with a person alleged to be a gang member.

In order to comply with federal law, the proposed regulations must clearly require that, in addition to satisfying at least two specified criteria, there must be reasonable suspicion that the person is involved in criminal activity, and specifically reasonable suspicion the person is an active gang participant[85]. We further suggest that the Department of Justice remove the category of "gang associate" from Section 752.6(c) because it is insufficient to include an individual in this database as an associate where law enforcement lacks reasonable suspicion that an individual is directly engaged in the illegal conduct of the criminal street gang, regardless of whether sufficient criteria may be satisfied.

e. **Notifying a Person of Inclusion in the CalGang Database** (CalGang Regulations, Art. 7, Sec. 753.6(i)(1))[86]; **An Agency's Response to an Information Request** (CalGang Regulations, Art. 8, Sec. 754(d)(1))[87]

These provisions relate to an agency's ability to present to a court, in camera, evidence relating to an individual's inclusion in a gang database that has not been disclosed to the individual pursuant to the process of disclosure specified in Penal Code Secs. 186.34(c)(1) and (d)(1)(B). While the legislation allows that, in certain instances, a law enforcement agency may be able to withhold information relating a gang designation,[88] both A.B. 90 and the California Rules of Court are clear that the record before a Superior Court when a petitioner challenges inclusion on a gang database is limited to the materials exchanged between the petitioner and the agency when contesting inclusion at the agency level.[89] To the extent these provisions appear to sanction the presentation of additional evidence to

[84] *People v. Robles*, 71 Cal. Rptr. 2d 877, 882 (1998) (holding that "the evidence is insufficient, as a matter of law, that defendant was an active participant in the [gang]" where it showed only that he "hung out" with individuals who were members and there was no evidence he engaged in gang activities with any members), aff'd in part on other ground, rev'd in part on other grounds, 23 Cal.4th 1106 (2000).

[85] *People v. Englebrecht*, 88 Cal. App. 4th 1236, 1261 (2001) (defining active gang member as "a person who participates in or acts in concert with an ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members individually or collectively engage in the acts constituting the enjoined public nuisance. The participation or acting in concert must be more than nominal, passive, inactive or purely technical.")

[86] These comments also apply to the similar provision in Shared Databases Regulations, Art. 7, Sec. 772.8(i)(1).

[87] These comments also apply to the similar provision in Shared Databases Regulations, Art. 7, Sec. 773.2(d).

[88] *See, e.g.,* Penal Code Sec. 186.34(d)(2).

[89] *See, e.g.,* Penal Code Sec. 186.35(c) ("The evidentiary record for the court's determination of the petition shall be limited to the agency's statement of the basis of its designation . . . and the documentation provided to the agency by

the Superior Court in camera that was not previously disclosed to the petitioner, it conflicts with the clear language of Penal Code Sec. 186.35(c) and California Rules of Court.

In addition, A.B. 90 and its predecessor A.B. 2298 (Weber 2016) were intended to increase the accuracy and transparency of in the information included within gang databases by providing meaningful due process to those placed on the database, including an opportunity to confront the allegations against them and counter with their own evidence.[90] Allowing law enforcement agencies to present evidence to a Superior Court to support an individual's inclusion in a database that the individual is unable to review or challenge undermines this goal and is incompatible with due process requirements.[91] While an agency has the right to withhold confidential information that may impede a criminal investigation, it may not use that information to circumvent the clear evidentiary limits imposed by law. While this may result in the removal of an individual from the CalGang database because the agency fails to provide clear and convincing evidence that an individual is an active member of a gang—as is required to remain in the database—this does not prevent the agency from continuing any ongoing criminal investigations.

We recommend striking the language in both provisions stating that "[n]othing in this subdivision restricts the release of [information] . . . under court order or for an in-camera review by a court."

* * *

We sincerely hope OAG and DOJ consider the objections and recommendations contained within this letter and revise the proposed regulations to reflect the underlying intent of this legislation to safeguard the privacy of the public and ensure that individuals are not unnecessarily added to and surveilled in gang databases.

Sincerely,

ACLU of California

CC: Shayna Rivera, CalGang Unit Manager

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the person contesting the designation); Cal. R. Ct. 3.2300(e)(2) ("The record is limited to the documents required by Penal Code section 186.35(c)).

[90] *See, e.g.,* Pub. Safety Committee Report at 4 (citing the author of A.B. 90 noting that "[t]wo recently passed state laws – S.B. 458 (Wright) and A.B. 2298 (Weber) – began the process of addressing accuracy, consistency and transparency in regards to shared gang databases by guaranteeing all people the right to be notified if they are designated a gang associate, affiliate or member; the right to challenge their designation at the agency level; the right to appeal an unfavorable decision to the civil court"); id. at 7 (committee citing courts' recognition that due process protections are necessary where individuals are designated gang members in other contexts); A.B. 2298, 2015-2016 Leg. Sess. (Cal. 2016), Ass. Comm. on Pub. Safety, Committee Analysis at 4 (recognizing that "[t]he [g]eneral [e]ffects of this [b]ill are to [i]nclude [d]ue [p]rocess [r]ights for those [d]esignated").

[91] See *August v. Dept. of Motor Vehicles*, 264 Cal.App.2d 52, 60 (1968) (presenting *evidence ex parte* violates due process when it does not give the person an opportunity to contest that evidence); *Lynn v. Regents of Univ. of California*, 656 F.2d 1337, 1345-46 (9th Cir. 1981); *cf. Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir. 1989) ("The risk of error is considerable when such determinations are made after hearing only one side."); *People v. Sanchez*, 18 Cal. App. 5th 727, 752 (2017) (noting "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights") (citation and quotation marks omitted).

Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820

Thomas Bierfreund, Associate Governmental Program Analyst
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway Sacramento, CA 95820

gangdatabaseGDTAC@doj.ca.gov

Attachment B

ACLU California

August 15, 2019

Attorney General Xavier Becerra
California Department of Justice
Attn: DOJ Regulations Coordinator
1300 I Street, Suite 820
Sacramento, CA 95814
DOJRegulationsCoordinator@doj.ca.gov

RE: Regulations for the Fair and Accurate Governance of the CalGang Database Title 11, Division 1, Chapter 7.5; Regulations for the Fair and Accurate Governance of Shared Gang Databases, Title 11, Division 1, Chapter 7.6

Dear Attorney General Becerra,

On behalf of the ACLU of California[1], which supported the passage of A.B. 90, and which works with those affected by shared gang databases, we submit these written comments to the Office of Attorney General (OAG) and California Department of Justice (DOJ) on the changes made to the proposed regulations for the Fair and Accurate Gang Database Act of 2017, referred to hereinafter as A.B. 90. We intend these comments as an addendum to our June 25, 2019 letter, which is attached.

As discussed in more depth in our June 25 letter, A.B. 90 directed the DOJ to promulgate regulations that safeguard access to the databases that police agencies use to share information about suspected gang members. The Legislature passed A.B. 90 in response to public outcry from those who have been personally affected by inclusion in the CalGang database as well as the State Auditor's CalGang report, which showed that the vague and subjective criteria for inclusion led to overbroad inclusion in the database and demonstrated the pressing need for rigorous oversight of these databases and strict regulation of their scope and usage.[2]

We recognize the effort expended in updating the proposed regulations and allowing the public the opportunity to comment on the updates, and we appreciate that the modified proposed regulations reflect many of our recommendations to improve the fairness and accuracy of gang databases, especially with regard to changes to the criteria for inclusion. We submit these comments to recommend specific changes in line with our previously submitted comments which we believe

[1] The ACLU of California is comprised of the ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego & Imperial Counties.

[2] *The CalGang Criminal Intelligence System: As the Result of Its Weak Oversight Structure, It Contains Questionable Information that May Violate Individuals' Privacy Rights* ("CalGang Audit"), CALIFORNIA STATE AUDITOR, Aug. 2016, at 3, https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf.

more accurately reflect the Legislature's intent and are consistent with the requirements imposed on the DOJ by A.B. 90 and existing law.

Comments on Modification to Text of Proposed Regulations

I. Removal of Gang Associate Designation Aligns with Reasonable Suspicion Standard Necessary to Include a Person in a Gang Database

We commend the DOJ for eliminating the designation of gang associate for inclusion in the gang database. As we noted in our June 25 letter, police agencies violate 28 C.F.R. § 23.20(a) when they include individuals in a gang database without reasonable suspicion that the individual has engaged in the illegal conduct, since the statute permits law enforcement agencies to "collect and maintain criminal intelligence information concerning an individual only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity."[3] Simply satisfying the requirements to qualify as a gang associate under the previous draft of the regulations is not reasonable suspicion that a person is involved in criminal conduct or activity. Some of the criteria, for example displaying a hand sign or having a tattoo tied to a specific criminal street gang, do not indicate that a person has participated in a crime. As described in our letter, in practice police used the gang associate designation to store the information of people who police do not even contend are involved in criminal activity, like mentors and intimate associates, such as a girlfriend who shares a home or children with an individual designated as a gang member. Thus, removal of this designation helps to ensure that only people reasonably suspected of illegal gang activity are entered into gang databases, and is therefore an important step towards bringing the regulations into compliance with the law.

II. Changes to the Criteria for Inclusion Improve the Fairness and Accuracy of Gang Databases, But Further Changes are Necessary

We support the DOJ's addition of a reasonable suspicion requirement (CalGang Regulations § 752.2(a); Shared Gang Database Regulations § 771.6(a)) for a person to be designated for inclusion in a gang database. As we described above and explained in detail in our June 25 letter, 28 C.F.R. § 23.20(a) permits the warehousing of individuals' information in gang databases "only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity."[4] The new language emphasizes that inclusion is only lawful with a nexus to gang activity; however, the word "may" in ". . . having reasonable suspicion that the person may participate in a criminal street gang . . ." does not reflect the language in 28 C.F.R. § 23.20(a) and could be interpreted as a lower standard. **We recommend that the DOJ omit the word "may."**

[3] 28 C.F.R. § 23.20(a) (emphasis added).
[4] 28 C.F.R. § 23.20(a) (emphasis added).

We also recommend that the DOJ add the language "based on specific and articulable facts" after "reasonable suspicion" both in CalGang Regulations § 752.2(a); Shared Gang Database Regulations § 771.6(a) and CalGang Regulations § 752.8(a)(1); Shared Gang Databases Regulations § 772.2(a)(1). The DOJ's Addendum to Initial Statement of Reasons states the word "articulable" was removed for the purpose of consistency. Case law requires that police base reasonable suspicion on "specific and articulable facts,"[5] so the additional language does not add any additional requirement, but more specifically lays out how police must meet the standard. To ensure clarity, the DOJ can use the language "based on specific and articulable facts" following "reasonable suspicion" throughout the regulations.

The regulations should incorporate the word "actively" before "participate" in the phrase "the person may participate in a criminal street gang." This addition conforms with A.B. 90's requirement that a police agency "establish the person's <u>active</u> gang membership . . ."[6] as well as Penal Code 186.22(a), which allows police to charge a person with a gang offense only if they "<u>actively participates</u> in any criminal street gang."[7] In addition to making the language more consistent with these sections of the Penal Code, the word reminds police agencies that they should not add individuals who formerly participated in gang activity but do so no longer.

We approve of the DOJ's decision to eliminate the following criteria for inclusion:

(1) seen associating with persons meeting the criteria for entry or who have previously been entered as a Gang Member into a database (formerly CalGang Regulations § 752.4(a)(4); formerly Shared Gang Databases Regulations § 771.6(a)(4));

(2) seen at one or more gang-related addresses or locations (formerly CalGang Regulations § 752.4(a)(6); formerly Shared Gang Databases Regulations § 771.6(a)(6)); and

(3) seen wearing a style of dress or accessory that is tied to a specific criminal street gang (formerly CalGang Regulations § 752.4(a)(7); formerly Shared Gang Databases Regulations § 771.6(a)(7)).

As detailed in our June 25 letter, these overbroad and inaccurate criteria apply indistinguishably to people who are not gang participants, usually people of color who live and work in Black and brown neighborhoods. Similarly, the criterion identified as a Gang Member or Gang Associate by a reliable source (formerly CalGang Regulations § 752.4(b)(3); formerly Shared Gang Databases Regulations § 771.6(a)(3)) is potentially inaccurate because it allows subjective opinions to substitute for evidence that can be challenged in audits and petitions for removal. Elimination of these criteria thus makes gang database fairer and more accurate.

[5] *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *U.S. v. Hensley*, 469 U.S. 221, 226 (1985).
[6] Penal Code § 186.35(d).
[7] Penal Code 186.22(a).

III. Despite Changes to Provisions on the Retention Period, the Retention Periods Chosen by the DOJ Are Not Evidenced-Based (CalGang Regulations, §§ 754.2-754.4; Shared Databases Regulations §§ 773.6-773.8)

As explained in our June 25 letter, research cited in the DOJ's Initial Statement of Reasons (SOR) supports a retention period much shorter than five years for adults and three years for juveniles. The numerous studies cited in the research assessment consistently find that "periods of active gang membership rarely extend beyond one to two years," with most reports finding that the majority of youth remain in a gang for less than one year.[8] The DOJ's decision to include youth as young as 13 in the databases conflicts with this empirical data.

The longitudinal data also shows that even when individuals joined gangs as adults, they "still reported short term gang membership with an average of 1.62 years in the gang."[9] Thus, even when limited to individuals joining gangs in adulthood, the empirical evidence does not support ongoing active membership lasting five years. We reiterate our recommendation that, at minimum, that youth placed in the database while under 18 years old remain in the database for no more than one year, and that the retention period for those entered as adults last no more than two years.

We also recommend that the DOJ amend the language in CalGang Regulations § 754.4 and Shared Gang Databases Regulations § 773.8 to clarify that the three-year retention period applies to those who are 13 to 17 years old <u>at the time of entry into a gang database</u> and the language in CalGang Regulations § 754.2 and Shared Gang Databases Regulations § 773.6 to clarify that the five-year retention period applies to those who are 18 years old or older <u>at the time of entry into a gang database</u>. Hypothetically, a 16-year-old individual's information could be stored in a gang database at the time they turn 18 years old. At that point, the five-year retention period should not apply, because the individual was a juvenile at the time of inclusion. Addition of the language "at the time of entry" would preclude confusion regarding the retention period that applies.

We approve of the DOJ's decision to require a minimum of two additional criteria to reset the retention period, as it prevents overbreadth due to the retention of individuals' information beyond the period of gang membership.

IV. The DOJ Should Impose More Rigorous Safeguards in the Provisions on Access and Proxy Sharing to Prevent Adverse Immigration Consequences

After submitting our June 25 letter, we discovered that the DOJ plans to sign memoranda of understanding (MOUs) with out-of-state and/or federal agencies granting access to CalGang. Given this context, we reiterate that allowing the DOJ to grant access to out-of-state agencies not only exceeds the authority granted to the DOJ under the statute but undermines the protections the

[8] Heistand at 20-21 (citing multiple studies finding that the majority of youth participate in gangs for less than a year); D. C. Pyrooz, G. Sweeten, and A. R. Piquero, *Continuity and change in gang membership and gang embeddedness*, 50(2) J. OF RES. IN CRIME AND DELINQ. 239, 244 (2013), https://doi.org/10.1177/0022427811434830.
[9] Heistand at 21.

Legislature thought necessary to limit the transmission of "fact-based or uncorroborated information" that results in a designation of gang membership.[10]

CalGang Regulations§ 750.8, mirrored in Shared Databases Regulations § 770.6, allows the DOJ to enter into a memorandum of understanding with an out-of-state or federal agency that would provide that agency with direct access to the CalGang database. However, nothing in A.B. 90 provides the DOJ the authority to grant this access. The DOJ's SOR cites to Penal Code Sec. 186.36(l)(7) as authority for this provision, but this section only directs the DOJ to adopt "[p]olicies and procedures for sharing information from a shared gang database with a federal agency, multistate agency, or agency of another state that is otherwise denied access. This includes the sharing of information with a partner in a joint task force." The Legislature specifically directed the DOJ to adopt policies that would permit the sharing of certain information obtained from a shared gang database while direct access was denied, not policies for granting unfettered access to agencies that are not permitted access under the existing law. As such, the proposed regulation exceeds the scope of legislative authority and should be not be included in the final regulations.

In addition to exceeding the DOJ's authority under A.B. 90, the current draft of regulations does not contain adequate safeguards against improper usage by out-of-state and federal agencies that are not liable under the California Values Act (S.B. 54). We recommend that the DOJ require Node and System administrators conduct six audits of out-of-state and federal agencies' use of CalGang and other shared gang databases, rather than three, as described in CalGang Regulations § 755.2(a) and Shared Gang Databases Regulations § 774.6(a). Regarding CalGang Regulations § 751.4 and Shared Gang Databases Regulations § 770.8, we recommend that the DOJ bar users in out-of-state and federal agencies from disseminating information via proxy query to non-users. Because out-of-state and federal agencies are not subject to the California Values Act (S.B. 54), which "prohibit[s] state and local law enforcement agencies, including school police and security departments, from using money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes and . . . proscribe[s] other activities or conduct in connection with immigration enforcement by law enforcement agencies," these agencies may disseminate information that is used for immigration enforcement purposes via proxy requests. DOJ should take extra precaution to ensure that the gang databases are not used for immigration enforcement purposes.

Additionally, we recommend that the DOJ add a provision to CalGang Regulations § 750.6 and Shared Gang Databases Regulations § 770.4 requiring the DOJ to publish on its website all MOUs with out-of-state and federal agencies, such that the public may know what agencies access the databases. The DOJ should report in its annual report on gang databases the number of searches by out-of-state agencies and federal agencies for the same reason.

Regarding CalGang Regulations § 751.4(a)(1), the DOJ should set a deadline for a user to provide the DOJ with the completed Proxy Query Agreement form for ease of administration. Given the simplicity of the form, we recommend the DOJ require submission within five days of the proxy

[10] Penal Code § 186.34(a)(2) (defining gang database).

query. Although Shared Gang Databases Regulations § 770.8 requires that users provide the proxy query information upon the DOJ's request if the information is directly input into the database, it does not require users to otherwise furnish the DOJ with proxy query information. We recommend that the same five-day deadline for providing the DOJ with the proxy query information apply to shared gang databases.

We also recommend that the DOJ add a provision to CalGang Regulations § 751.4 and Shared Gang Databases Regulations § 770.8 requiring the DOJ to publish (a) the number of proxy queries per requesting agency and granting agency in its annual report on gang databases, and (b) the names of the requesting agencies submitting proxy requests, so the public may know what agencies access the databases.

Lastly, we recommend that the language "unless required by state or federal statute or regulation" in CalGang Regulations § 751.4(a)(4)(B)(1) and Shared Gang Databases Regulations §770.8(a)(3)(B)(1) be strictly limited in order to fulfill the purpose of AB 90. AB 90 limited the sharing of records in the gang database for purposes of enforcing federal immigration law, with a limited exception to account for 8 U.S.C. §§ 1373, 1644. S.B. 54 similarly prohibits law enforcement agencies from using agency personnel and resources for the purposes of immigrant enforcement, with only a limited carve-out to account for 8 U.S.C. §§ 1373, 1644. *See* Cal. Gov't Code 7284.6(e). If left unaddressed, the language "unless required by state or federal statute or regulation" could be interpreted expansively by out-of-state or federal agencies; these agencies may argue that their state or federal laws require them to use the gang database information for immigration purposes. Such a loophole would undermine the purpose of AB 90. Therefore, to be clear that AB 90 was intended to provide only a limited carve-out to account for 8 U.S.C. §§ 1373, 1644, the phrase "unless required by state or federal statute or regulation" be deleted or replaced with "unless required to comply with sections 1373 and 1644 of title 8 of the United States Code."

V. The Proposed Regulations Undercut the Clear Statutory Limits on Evidence that a Superior Court May Consider When Deciding on a Removal Petition

CalGang Regulations § 753.4(i)(1); Shared Gang Databases Regulations § 772.8(i)(1) and CalGang Regulations § 754(b)(1); Shared Gang Databases Regulations § 773.4(b)(1) relate to an agency's ability to present to a court, in camera, evidence relating to an individual's inclusion in a gang database that has not been disclosed to the individual pursuant to the process of disclosure specified in Penal Code Secs. 186.34(c)(1) and (d)(1)(B). While the legislation allows that, in certain limited instances, a law enforcement agency may be able to withhold information relating to a gang designation,[11] both A.B. 90 and the California Rules of Court are clear that when a petitioner challenges inclusion on a gang database, the record before a Superior Court is limited to the materials exchanged between the petitioner and the agency.[12] To the extent these provisions appear

[11] *See, e.g.,* Penal Code Sec. 186.34(d)(2).

[12] *See, e.g.,* Penal Code Sec. 186.35(c) ("The evidentiary record for the court's determination of the petition shall be limited to the agency's statement of the basis of its designation . . . and the documentation provided to the agency by the person contesting the designation); Cal. R. Ct. 3.2300(e)(2) ("The record is limited to the documents required by Penal Code section 186.35(c)").

to sanction the presentation of additional evidence to the Superior Court in camera that was not previously disclosed to the petitioner, they conflict with the clear language of Penal Code Sec. 186.35(c) and California Rules of Court.

If DOJ keeps these provisions, we recommend striking the language in both provisions stating that "[n]othing in this subdivision restricts the release of [information] . . . under court order or for an in-camera review by a court." The Court of Appeals is currently considering whether a court's consideration of evidence presented in camera violates A.B. 90 and due process in *Simmons v. City of San Diego*, Case No. 37-2018-0000190-CL-PT-CTL. The DOJ regulations ought not take a position on the legality of such a non-disclosure, especially as the issue is being litigated.

VI. The Gang Database Technical Advisory Committee Should Be Asked to Continue Its Oversight Mission by Allowing Members to Participate in California Gang Node Advisory Committee Meetings

To the extent that the California Gang Node Advisory Committee (CGNAC) serves any purpose in the operation of CalGang, its meetings must be transparent. Prior to the passage of A.B. 90, the CalGang Audit noted that inadequate oversight by the CalGang Executive Board and CGNAC contributed to inaccuracy of the database and privacy violations.[13] The audit stated, "These oversight entities function independently from the State and without transparency or meaningful opportunities for public engagement."[14] Although A.B. 90 assigns the DOJ an oversight function in collaboration with the CGNAC, participation of the Gang Database Technical Advisory Committee (GDTAC), whose membership includes both law enforcement officials and representatives of community members, would ensure increased transparency over the CGNAC's operation of CalGang. We recommend the DOJ add a provision allowing members of the GDTAC to participate in CGNAC

VII. These Regulations Should Apply Retroactively.

These regulations should apply to individuals entered into a gang database prior to the regulations' effective date to ensure fairness those entered using criteria eliminated from the regulations due to their overbreadth and inaccuracy. In addition to requiring the DOJ to promulgate rules for gang databases that "ensure accuracy, reliability and proper use" of gang databases, Penal Code § 186.36(n) requires the DOJ to "mandate the purge of any information for which a user agency cannot establish adequate support." As discussed previously, the DOJ eliminated the criteria (1) identified as a Gang Member or Gang Associate by a reliable source (formerly CalGang Regulations § 752.4(b)(3); formerly Shared Gang Databases Regulations § 771.6(a)(3)); (2) seen associating with persons meeting the criteria for entry or who have previously been entered as a Gang Member into a database (formerly CalGang Regulations § 752.4(a)(4); formerly Shared Gang Databases Regulations § 771.6(a)(4)); (3) seen at one or more gang-related addresses or locations (formerly CalGang Regulations § 752.4(a)(6); formerly Shared Gang Databases Regulations § 771.6(a)(6)); and (4) seen wearing a style of dress or accessory that is tied to a specific criminal street gang

[13] CalGang Audit at 1.
[14] CalGang Audit at 1.

(formerly CalGang Regulations § 752.4(a)(7); formerly Shared Gang Databases Regulations § 771.6(a)(7)) from the latest draft of the regulations because they were inaccurate. Without these criteria, numerous entries in CalGang are no longer supported by evidence an agency can use to maintain the entries in the database, and it would be arbitrary and unfair to allow unsupported entries to remain in the database simply because they were entered prior to the effective date of the regulations. Adding a provision requiring the DOJ to apply these regulations retroactively would clarify the DOJ's obligation under Penal Code § 186.36(n) to purge unsupported entries and would make the database more accurate and fairer. We recommend that the DOJ add a provision requiring retroactive application of these regulations.

* * *

We sincerely hope OAG and DOJ consider the objections and recommendations contained within this letter and revise the proposed regulations to reflect the underlying intent of this legislation to safeguard the privacy of the public and ensure that individuals are not unnecessarily added to and surveilled in gang databases.

Sincerely,

ACLU of California

CC: Shayna Rivera, CalGang Unit Manager
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820

Thomas Bierfreund, Associate Governmental Program Analyst
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway Sacramento, CA 95820

gangdatabaseGDTAC@doj.ca.gov

Attachment C

STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0079
(916) 319-2079
FAX (916) 319-2179

DISTRICT OFFICE
1350 FRONT STREET, SUITE 6046
SAN DIEGO, CA 92101
(619) 531-7913
FAX (619) 531-7924

Assembly
California Legislature

SHIRLEY N. WEBER
ASSEMBLYMEMBER, SEVENTY-NINTH DISTRICT

COMMITTEES
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BUDGET
EDUCATION
ELECTIONS AND REDISTRICTING
HIGHER EDUCATION

SUBCOMMITTEES
CHAIR: BUDGET SUBCOMMITTEE NO. 5 ON PUBLIC SAFETY
BUDGET SUBCOMMITTEE NO. 6 ON BUDGET PROCESS OVERSITE AND PROGRAM EVALUATION

SELECT COMMITTEE
CHAIR: CAMPUS CLIMATE

June 25, 2019

The Honorable Xavier Becerra
Attorney General, State of California
1300 I Street,
Sacramento, CA 95814

RE: Proposed Regulations to sections 750 through 757 of Title 11, Division 1, Chapter 7.5, of the California Code of Regulations (CCR), concerning the Fair and Accurate Governance of the CalGang Database, pursuant to the authority provided in Penal Code section 186.36.

Dear Attorney General Becerra,

I authored AB 90 with the intent of remedying the harmful effects of excessive law enforcement discretion in the use of shared gang databases. But the proposed regulations you have drafted fail to accomplish that purpose in their two most important provisions: criteria for entry and retention period. I strongly urge you to revise the regulations to better reflect the intent of the legislation that authorizes them.

My concern about gang databases began when my son, who is not a gang member or gang associate, told me that he had been driving in the San Diego Gaslamp with a friend the night before and had been pulled over by local law enforcement. He told me police officers asked him and his passenger to sit on the curb, while they went through his car. As officers finished their search of my son's car, they told him they might have to put him on the gang database. My alarm grew when I saw the existing criteria for entry into the database. I recognized how the criteria could lead to overly broad targeting of individuals and racial profiling. Due to these concerns, I requested an audit of CalGang and authored AB 2298 to enact reforms.

In 2016, the California State Auditor published her report on CalGang, validating my concerns that CalGang was overinclusive and identifying a serious problem — the excessive discretion written into CalGang policy and procedures was compounded by a lack of effective oversight. I authored AB 90 to address both the overinclusiveness and the lack of oversight. To address these concerns, AB 90 required the Department of Justice to promulgate regulations and specifically mandated that these regulations use criteria that are "unambiguous, not overbroad, and consistent with empirical research."[1] The law further expressly disapproved of "jail classification,

[1] Penal Code § 186.36(l)(2).

frequenting gang neighborhoods, or on the basis of an untested informant" as criteria.[2] AB 90 also demanded that the regulations set a retention period for records identifying individuals as gang members "that is consistent with empirical research on the duration of gang membership."[3]

The proposed regulations will not remedy the problem that people – specifically young men of color – are inappropriately being placed on the database because they offer few substantive improvements over the problematic criteria that they are supposed to replace. In fact, the Initial Statement of Reasons expressly state that "the purpose of this [criteria] section is to codify existing designation criteria, while requiring thorough documentation in order to substantiate their use." This is most definitely *not* what the Legislature asked the Department to do.

In addition, the proposed regulations do not improve the policy regarding how long an individual would remain on the database. The proposed regulations keep the retention period at five years, the maximum allowed by federal law, and the burden for restarting the five-year clock has been kept at one criterion. It takes two criteria to get you on the database, and only one criterion to keep you on it. In other words, an officer could restart the five-year clock on an individual every time he or she saw an individual anywhere that officer thought was a "gang location," be it the park or anywhere in public where the officer thinks there is a "high gang presence."

To bring these regulations into alignment with the requirements of AB 90, I strongly urge in the strongest terms that your agency revise them as follows:

1. **Remove ambiguous and overbroad criteria.**
   a. The criterion "identified . . . by a reliable source" contradicts the purpose of AB 90 by allowing inclusion in the database based on unsubstantiated allegations. The proposed regulations do not require that police document the circumstances on which they base the source's credibility. As a result, a police officer could simply assert that person is a gang member to satisfy this criterion. A source could also circumvent the criteria prohibited by AB 90, by basing their opinion on an individual's jail classification, on the individual's presence in a gang neighborhood, or on the untested opinion of another person. Lastly, an auditor or individual petitioning for removal could not challenge an improper assertion because of the lack of documentation. For these reasons, "identified . . . by a reliable source" should not be an independent criterion.
   b. The criterion "seen associating with" suspected gang members is ambiguous and overbroad. This criterion could include playing sports at the park, washing clothes at a local laundromat, attending a family gathering, or any of the myriad of ways that non-gang members and gang members might come into contact in day-to-day community interactions.
   c. The criterion "seen at one or more gang-related addresses or locations" is ambiguous and overbroad. It is not sufficient to limit these locations to only locations that are named and considered to have a "high gang presence." Law enforcement routinely refer to whole neighborhoods as gang areas. This is only reinforced by the misplaced reference to gang injunction "safety zones" in the Initial Statement of Reasons. These "safety zones" often include most of an entire

[2] Penal Code § 186.36(r)(1).
[3] Penal Code § 186.36(l)(3).

city. Finally, this criterion is essentially identical to the criterion of present in a "gang neighborhood" that was expressly disapproved of in AB 90.

d. The criterion "seen wearing a style of dress or accessory that is tied to a specific criminal street gang" is ambiguous and overbroad. This criterion could include red basketball shorts, Air Jordan sneakers, a t-shirt with the name of the local high school, or any of the other clothes a person might wear if those clothes are also popular with the local gang. Merely requiring an officer to expressly state that the clothing item is related to a gang does nothing to protect against inaccurate designations. This criterion is also duplicative of the criteria of displaying gang symbols. If an article of clothing has a gang symbol on it, there is already a criterion to cover that.

2. **Require that more than two criteria for entry must be met.** The fact that the recent attention to CalGang over the last several years has resulted in the number of records being cut in half is evidence that the old policy was overbroad. One reason the old policy was overbroad is the low threshold for entry. The number of criteria should be raised to increase the burden on law enforcement so that there will be fewer inaccurate designations. It is of no matter that the requirement of two criteria is frequently used outside California. These other states all followed California's lead in deciding on two, and investigations into other state's gang databases, such as in Chicago, Illinois and Portland, Oregon have found those other state's databases as overinclusive as California's.

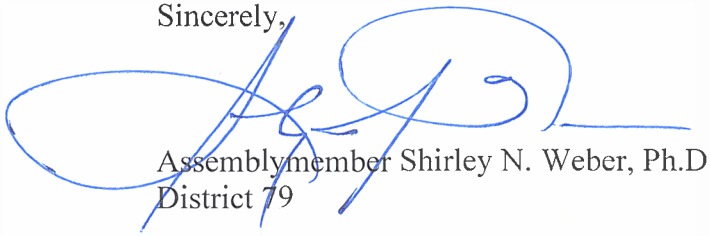
3. **Shorten the retention period.** A five-year retention period, restarted whenever a single criterion is met, is the longest possible retention period allowed under federal privacy laws. The Initial Statement of Reasons acknowledge that there is no empirical research to support keeping the maximum allowable retention period and acknowledges that the existing research finds that gang membership tends to last less than three years. Nonetheless, the proposed regulations keep the five-year retention period on the incorrect premise that the purpose of the regulations is to codify existing policy. That is not the purpose of the regulations. The express purpose is to establish retention periods "consistent with empirical research on the duration of gang membership." If the existing research, limited as it is, states that gang careers typically last less than three years, then the retention period should be less than three years. If more research finds that is incorrect, then this may be revisited. Furthermore, it is important to recognize that, because the retention period may be restarted, the period we are talking about is the *minimum* duration a record is likely to be kept. Active gang members, even with a two- or three-year retention period, are likely to remain in the gang database for much longer, which is consistent with the research finding that some small number of gang members do have gang careers that last longer than three years.

4. **The criteria to restart the retention period should be the same as the criteria for entry.** It is patently overbroad to allow a retention period to be restarted merely on the meeting of a single criterion.

5. **Eliminate the "gang associate" category.** The requirements to be entered as a gang associate are essentially the same as entry as a gang member. Police may designate an individual as a gang member if they can satisfy two criteria. Under the proposed regulations, to designate an individual as a gang associate, police must satisfy two requirements: the criterion of association with a gang member or associate and one other criterion. Any person who satisfies the criteria for a gang associate, thus also satisfies the criteria for a gang member. Aside from this technical error, people who know gang members but have no other connection to criminality cannot be in a gang database. 28 C.F.R. Sec. 23.20(a) permits law enforcement agencies to "collect and maintain criminal intelligence information concerning an individual only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity." That someone talks to, grew up with, or knows a gang member is not reasonable suspicion that the person is involved in criminal conduct. To include such individuals in a gang database would therefore violate 28 C.F.R. Sec. 23.20(a). I urge you to eliminate the associate category to avoid confusion and ambiguity in entry and in administrative and court requests for removal.

For the reasons above, I ask that you honor the intent of AB 90 by making the changes I have recommended to the proposed regulations. I thank you and your staff for your work to develop these regulations. Thank you for your leadership in championing the rights of all Californians regardless of their race, their clothing, their neighborhood, and their friends and relatives.

Sincerely,



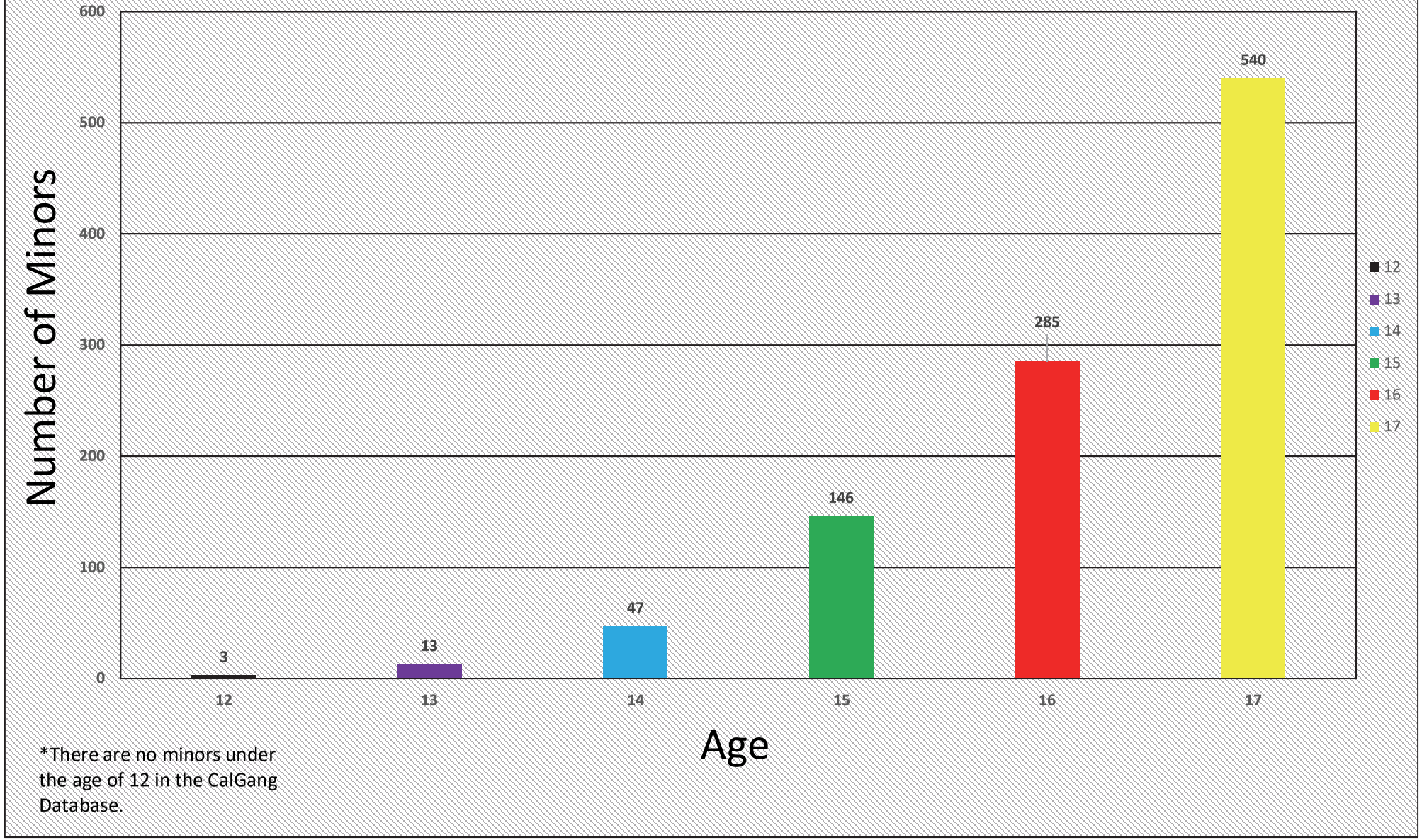
Assemblymember Shirley N. Weber, Ph.D.
District 79

CC: Shayna Rivera, CalGang Unit Manager
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820
Email: gangdatabaseGDTAC@doj.ca.gov

Thomas Bierfreund, Associate Governmental Program Analyst
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820
Email: gangdatabaseGDTAC@doj.ca.gov

Attachment D

Number of Minors in CalGang Per Age on 3-11-2019



*There are no minors under the age of 12 in the CalGang Database.